88-315

Supreme Court, U.S.
FILED
JUN 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

NATIONAL-SOUTHWIRE ALUMINUM COMPANY,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
LEE A. THOMAS, Administrator, and
JACK E. RAVEN, Regional Administrator,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Chester R. Babst III, Esquire
Babst, Calland, Clements & Zomnir, P C
Two Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel of Record for Petitioner
National-Southwire Aluminum Company

QUESTIONS PRESENTED

1. Did the Court of Appeals misinterpret the language and legislative intent of Section 111 of the Clean Air Act in upholding a determination of the Environmental Protection Agency ("EPA") which would prevent States from correcting overly strict emission standards and discourage voluntary pollution control?

2. Did the Court of Appeals usurp the responsibility of the EPA Administrator in making a determination of environmental impact?

TABLE OF CONTENTS

	Page
Questions Presented	(i)
Table of Contents	(ii)
Table of Authorities	(iv)
Petition for Writ of Certiorari	1
Opinion Below	1
Statement of Jurisdiction	2
Statute and Regulations Involved	3
Statement of the Case	4
Reasons for Granting the Writ	10
Argument	11
I. Important questions are raised by the Court of Appeals' decision which have not been but should be addressed by this Court	11
A. The Court of Appeals misinterpreted the language and the legislative intent of Section 111 of the Clean Air Act	11
B. The Court of Appeals decision would prevent a State from correcting overly strict non-health-related emissions standards	12
C. The Court of Appeals decision would discourage voluntary pollution control	13
II. The Court of Appeals usurped the respon - sibility of the EPA Administrator to make a determination of the environmental impact of the proposed correction of Petitioner's emission control system	15
Conclusion	17

Appendices (bound separately)

APPENDIX A — Page

Opinion of the Court of Appeals filed February 1988 ..... 1a

Formal Determination of Environmental Protection Agency dated September 22, 1986 ..... 19a

Judgment of the Court of Appeals entered April 6, 1988 ..... 26a

Order of the Court of Appeals denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc entered March 25, 1988 ..... 27a

APPENDIX B

Clean Air Act, Section 111 ..... 28a

40 C.F.R. §§60.5, 60.14, 60.22, 60.24 and 60.28 ..... 38a

APPENDIX C

EPA Region IV, "Technical Support Document for the Revision to Kentucky's §111(d) Plan for Controlling Fluoride Emissions from Existing Primary Aluminum Reduction Plants" (June 24, 1986) 46a

TABLE OF AUTHORITIES

CASES — PAGE

National-Southwire Aluminum Company v. United States Protection Agency, 838 F.2d 835 (6th Cir. 1988) 2

STATUTES

28 U.S.C. §1254 (1) 2

42 U.S.C. §7411 ..... 3, 5, 6 & 7

42 U.S.C. §7607 (b) 8

REGULATIONS

40 C.F.R. §60.5 ..... 3 & 8

40 C.F.R. §60.14 ..... 3 & 15

40 C.F.R. §60.22 3

40 C.F.R. §60.24 3

40 C.F.R. §60.28 ..... 3 & 13

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner National-Southwire Aluminum Company[1], appellant below, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 1, 1988.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, filed February 1, 1988,

---

[1] Pursuant to Supreme Court rule 21 1, the caption to this case sets forth the names of all the parties hereto and therefore will not be repeated herein. Pursuant to Supreme Court Rule 28.1, the following is a list of all parents, subsidiaries, and affiliates of National-Southwire Aluminum Company:

National Aluminum Corporation, a wholly owned subsidiary of National Intergroup, Inc., of Pittsburgh, Pennsylvania, owns 54.5% of National-Southwire Aluminum Company; Southwire Company, of Carrolton, Georgia, owns the remaining 45.5% of National-Southwire Aluminum Company.

upholding a formal determination by the United States Environmental Protection Agency ("EPA") that a change in the operation of an emission control system at Petitioner's aluminum reduction plant would constitute a "modification" of a "stationary source" within the meaning of the Clean Air Act, is set forth at 838 F.2d 835 (6th Cir. 1988) and in Appendix A hereto at page 1a.

EPA's formal determination, issued on September 22, 1986, is set forth in Appendix A hereto at page 19a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for which National-Southwire Aluminum Company seeks review, Appendix A (26a), was dated and entered February 1, 1988. The order of the Court of Appeals denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was filed on March 25, 1988, Appendix A (27a), and dated and entered on April 6, 1988. Jurisdiction to review the judgment of the Court of Appeals is conferred on the Supreme Court by the Act of Congress of June 25, 1948, c.646 (62 Stat. 869), section 1254(1) (28 U.S.C. §1254(1)).

STATUTE AND REGULATIONS INVOLVED

The statute involved in this case is Section 111 of the Clean Air Act, 42 U.S.C. §7411, which is set forth in Appendix B hereto at page 28a. The regulations involved in this case are codified at 40 C.F.R. §§60.5, 60.14, 60.22, 60.24 and 60.28, which are set forth in Appendix B at page 38a.

STATEMENT OF THE CASE

Petitioner owns a primary aluminum reduction plant in Hawesville, Kentucky, the operation of which results in the emission of gaseous fluoride. At the time of its construction in 1969, before the passage of the Clean Air Act, Petitioner voluntarily equipped the plant with an emission control system that included wet scrubbers. The scrubbers represented what at that time was believed to be the most effective means of controlling gaseous fluoride emissions and were included as a part of the control system by Petitioner despite the fact that there was no statutory or regulatory requirement to limit gaseous fluoride emissions.

Subsequent to the voluntary control of gaseous fluoride emissions by Petitioner, the EPA adjudged these emissions to be "welfare-related" pollutants which, by definition, "do not pose a threat to human health." Section 111(d) of the Clean Air Act

entrusted regulation of existing sources of such pollutants to the States, subject to EPA approval.[1]

Kentucky adopted standards for gaseous fluoride emissions in 1981, and EPA approved Kentucky's standards in 1982. (3a). These new state standards simply required the same level of emission control that Petitioner had already been achieving by the use of its emission control system with wet scrubbers since 1969.

In 1982, during a routine maintenance-related shutdown of the wet scrubbers, Petitioner's monitors detected no appreciable change in ambient fluoride levels. (4a). Moreover, between 1983 and 1986, Petitioner operated its emission control system without utilization of the wet

---

[1] Section 111(d) provides in pertinent part that:

> each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued... but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance.

42 U.S.C. §7411(d).

scrubbers pursuant to a variance granted by the Commonwealth of Kentucky. During the approximate three year period in which the variance was in effect Petitioner's monitors again detected no appreciable change in ambient fluoride levels. Petitioner thereupon sought and obtained from Kentucky a relaxation of the State's Section 111(d) fluoride emission standard to permit it to curtail the increasingly costly operation of its wet scrubbers.[2] (4a).

Kentucky submitted a proposed form of its relaxed gaseous fluoride emission standard to the EPA's Region IV office on March 22, 1985. (4a). The proposed regulation included a stipulation that turning off the wet scrubbers to take advantage of the relaxed standard would not be considered a "modification" that would render the plant subject to new source performance standards under the provisions of Section 111(b) of the Clean Air Act. (4a-5a).

---

[2] Section 111(a)(1)(c) of the Clean Air Act requires that, in establishing standards of performance for welfare-related pollutants, the States and EPA take into consideration "the cost of achieving such emission reduction, and any nonair quality health and environmental impact and energy requirements." 42 U.S.C. §7411(a)(1)(c). In the case of the wet scrubbers, Petitioner incurs annual operating and maintenance costs in excess of $2,200,000.

On June 24, 1986, Region IV endorsed the proposed relaxation of the Kentucky standard in a draft Federal Register notice and technical support document. Region IV concluded, inter alia, (1) that an emission control system with wet scrubbers was "an overly effective means of controlling total fluoride emissions from the plant" (49a), (2) that Petitioner's control system without the wet scrubbers was "an effective means of controlling fluoride emissions (at a reasonable cost)" (49a), and (3) that turning off the scrubbers "will not have a harmful effect on the environment." (51a).

Region IV went on to assert, however, that if Petitioner turned off its scrubbers, it would constitute a "modification" which would subject the plant to federal new source performance standards,[3] which in turn would require the

---

[3] The Clean Air Act calls for federal performance standards for all "new sources" of pollution, including "any stationary source, the construction or modification of which is commenced after the publication of regulations... prescribing a standard of performance under this section which will be applicable to such source." 42 U.S.C. §7411 (a)(2). Modification is defined as "any physical change in, or change in the method of operation of a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. §7411 (a)(4).

installation of a prohibitively expensive new emission control system. (52a).

On September 22, 1986, responding to a request filed by Petitioner pursuant to 40 C.F.R. §60.5, the EPA issued a formal determination reiterating the assertion of Region IV that the proposed correction to Petitioner's emission control system would trigger the imposition of new source performance standards. (19a).

Petitioner challenged the EPA determination in a Petition for Review filed in the United States Court of Appeals for the Sixth Circuit on October 27, 1986.[4] Petitioner raised, inter alia, the following arguments before the Court of Appeals:

1) that the proposed operation of Petitioner's emission control system would not constitute a "modification" of an existing facility absent a determination by the EPA Administrator that it would be "less

---

4 The Court of Appeals had jurisdiction to review EPA's action pursuant to 42 U.S.C. §7607 (b).

environmentally beneficial" than the present system; and

2) that the imposition of new source performance standards would be inconsistent with the legislative intent behind Section 111 of the Clean Air Act.

On February 1, 1988, the Court of Appeals denied the Petition for Review, Judge Boggs dissenting. (1a). The Court of Appeals held that, because the proposed operation of Petitioner's emission control system without the wet scrubbers would result in an increase in gaseous fluoride emissions, it would necessarily be less environmentally beneficial. (12a). Moreover, the Court of Appeals found that the imposition of new source performance standards would not be inconsistent with legislative intent, because Congress intended in Section 111 simply "to establish existing levels of emissions as a baseline above which an existing source may not pollute without becoming subject to NSPS." (13a).

The Court of Appeals denied Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc on March 25, 1988. (27a).

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision upholding the EPA determination that a State-approved correction in the operation of an emission control system would trigger the imposition of federal new source performance standards will discourage voluntary pollution control and prevent the States from correcting overly strict emission standards for welfare-related pollutants which are inconsistent with the statutory criteria of Section 111(d) of the Clean Air Act. This raises important questions concerning the proper interpretation of Section 111(d) of the Clean Air Act which have not been, but should be, settled by this Court.

The Court of Appeals' unwarranted usurpation of the responsibility of the EPA Administrator to make a determination of the environmental impact of the proposed correction of Petitioner's emission control system represents a substantial departure from the usual course of judicial proceedings, and provides a second reason for granting the writ.

ARGUMENT

I. Important questions are raised by the Court of Appeals' decision which have not been but should be addressed by this Court.

A. The Court of Appeals misinterpreted the language and the legislative intent of Section 111 of the Clean Air Act.

In Section 111 (b) of the Clean Air Act, Congress provided that strict, technology-based new source performance standards of emission control would be applied to all new or newly modified sources of air pollution. By so doing, Congress intended "to address pollution problems when those problems are easiest to fix, at the time of the new construction." (15a).

Congress chose not to impose these strict new source performance standards on existing sources, for whom the expense of retrofitting state-of-the-art control equipment may have been a fatal burden. Rather, in Sections 111(d) and 111(a)(1)(c), Congress provided for the setting of non-health-related emission control standards for existing sources by the States (subject to EPA approval), taking into consideration the cost of achieving emission reduction and any nonair quality health

and environmental impact and energy requirements.

The Court of Appeals decision holding that a correction in the operation of an overly effective and overly costly emission control system would trigger new source performance standards and require the retrofitting of an existing facility with prohibitively expensive new control devices runs completely counter to the statutory scheme of Section 111. Great violence will be done to the legislative intent of this important provision of the Clean Air Act if this decision is allowed to stand.

B. The Court of Appeals decision would prevent a State from correcting overly strict non-health-related emissions standards.

As noted above, Section 111(d) of the Clean Air Act provides that, in establishing non-health-related emission standards for existing sources, "states can decide for themselves what costs they wish to impose for what level of protection of vegetation and inanimate objects." (15a).

Where a State initially establishes a standard it later determines to be overly strict, federal regulations provide a mechanism for the State to

relax that standard, subject to EPA approval. 40 C.F.R. §60.28. In this case, the Commonwealth of Kentucky, taking into consideration the substantial cost of operating Petitioner's scrubbers versus the negligible environmental benefits they provide, determined that its existing standard for gaseous fluoride emissions was overly strict and inconsistent with the statutory criteria of Section 111(d) of the Clean Air Act and should be relaxed. The EPA, taking account of the same factors, proposed to approve Kentucky's relaxed standard (5a-6a); however, its determination that the corrected operation of the scrubbers would trigger new source performance standards defeats the purpose.

Indeed, by effectively preventing a State from correcting an overly strict emission standard, the Court of Appeals decision upholding the EPA determination effectively defeats the legislative intent behind Section 111(d) to give the States the authority to establish and enforce non-health-related emission standards for existing sources.

C. The Court of Appeals decision would discourage voluntary pollution control.

As noted by Judge Boggs in his dissent below, the problems Petitioner and the Commonwealth of

Kentucky face are largely "an accident of timing." (15a). Had Petitioner not voluntarily installed state-of-the-art wet scrubbers in 1969, it might never have been required to do so, since Kentucky might never have adopted the overly strict emission standard which mandated their use.

By preventing Petitioner from correcting the operation of its emission control system, the Court of Appeals decision penalizes Petitioner for having voluntarily installed an overly effective system. Moreover, by effectively preventing the Commonwealth of Kentucky from relaxing its emission standard, the Court of Appeals decision penalizes Kentucky for having initially established an overly strict standard.

This kind of "minnow-trap" enforcement, in the words of Judge Boggs, "creates a national enforcement strategy completely hostile to any willing compliance with pollution control standards." (16a). Such a result could hardly have been intended by Congress.

II. The Court of Appeals usurped the responsibility of the EPA Administrator to make a determination of the environmental impact of the proposed correction of Petitioner's emission control system.

Federal regulations provide that the following shall not constitute a modification of a stationary source under the Clean Air Act:

> The addition or use of any system or device whose primary function is the reduction of air pollutants, except when an emission control system is removed or is replaced by a system which the Administrator determines to be less environmentally beneficial.

40 C.F.R. §60.14(e)(5) (emphasis added).

The EPA Administrator has not made a determination that the corrected operation of Petitioner's emission control system would result in a system which was "less environmentally beneficial". Indeed, he would have been hard pressed to do so in light of monitoring data which showed no increase in ambient fluoride levels from the corrected operation and in light of his own agency's findings

that the correction would result in no harmful effect to the environment.

The Administrator's failure to make a determination of environmental impact should have been fatal to the EPA determination that the corrected operation of Petitioner's emission control system would constitute a modification of a stationary source. The Court of Appeals' conclusion that, simply because increased emissions would result, the corrected system would necessarily be "less environmentally beneficial" constitutes an unwarranted and indefensible usurpation of the EPA Administrator's responsibility to make that determination, if he can.

CONCLUSION

The Court of Appeals decision misinterprets the language and legislative intent of Section 111 of the Clean Air Act to reach a result which prevents a State from correcting an overly strict emission standard and serves to discourage voluntary pollution control. A writ of certiorari is warranted by the public importance of these concerns and, further, by the Court of Appeals' unwarranted usurpation of the EPA Administrator's unfulfilled responsibility to make a determination of environmental impact.

Respecfully submitted,

Chester R. Babst III
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel of Record for
National-Southwire Aluminum Company

June 23, 1988

CERTIFICATE OF SERVICE

I hereby certify that I served three true and correct copies of the foregoing Petition for Writ of Certiorari to be mailed first-class, postage prepaid, this 22nd day of June, 1988, upon:

Solicitor General
Department of Justice
Washington, D.C. 20530

Brian Faller, Attorney
Environmental Defense Section
Land and Natural Resources Division
U. S. Department of Justice
Post Office Box 23986
Washington, D.C. 20026-3986

Earl C. Salo, Esquire
Office of General Counsel
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Chester R. Babst III, Esquire
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel of Record for
National-Southwire Aluminum Company

Supreme Court, U.S.
FILED
OCT 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 88-315

In the Supreme Court of the United States

OCTOBER TERM, 1988

NATIONAL-SOUTHWIRE ALUMINUM CO., PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General

ROGER J. MARZULLA
Assistant Attorney General

BRIAN FALLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

16 pp

QUESTION PRESENTED

Whether the Environmental Protection Agency (EPA) correctly determined that turning off air pollution control equipment at petitioner's aluminum reduction plant, which would increase fluoride emissions by more than 1,000 tons annually, would constitute a modification of a stationary source within the meaning of Section 111(a)(4) of the Clean Air Amendments of 1970, 42 U.S.C. 7411(a)(4).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Chevron U.S.A. Inc. v. *NRDC, Inc.*, 467 U.S. 837 (1984) 8, 9, 10
National Asphalt Pavement Ass'n v. *Train*, 539 F.2d 775 (D.C. Cir. 1976) 7
Train v. *NRDC, Inc.*, 421 U.S. 60 (1975) 3

Statutes:

Clean Air Amendments of 1970, 42 U.S.C. (& Supp. IV) 7401 *et seq.* 2, 3, 10
§ 110, 42 U.S.C. 7410 3
§ 111, 42 U.S.C. 7411 ..... 8, 9, 10
§ 111(a)(2), 42 U.S.C. 7411(a)(2) 2, 8
§ 111(a)(4), 42 U.S.C. 7411(a)(4) 2, 7-8
§ 111(b), 42 U.S.C. 7411(b) 2, 6
§ 111(d), 42 U.S.C. 7411(d) 2, 3, 4, 6, 9

40 C.F.R.:

Pt. 50 3
Pt. 52:
Section 52.21(b)(23)(i) 4
Pt. 60:
Section 60.5 4
Section 60.14(e)(5) 6, 10, 11
Section 60.23 4
Section 60.27 4
Pt. 61 3

Statutes—Continued: Page

39 Fed. Reg. (1974):

p. 36946 6
p. 36948 12
p. 37730 3

45 Fed. Reg. (1980):

p. 52676 4
p. 52709 4

Miscellaneous:

H.R. Rep. 91-1146, 91st Cong., 2d Sess. (1970) 8
S. Rep. 91-1196, 91st Cong., 2d Sess. (1970) 8

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-315

NATIONAL-SOUTHWIRE ALUMINUM CO., PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 838 F.2d 835.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26a-27a) was entered on February 1, 1988, and a petition for rehearing was denied on March 25, 1988. The petition for a writ of certiorari was filed on June 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Clean Air Amendments of 1970, 42 U.S.C. (& Supp. IV) 7401 *et seq.*, Congress adopted a two-pronged strategy for improving air quality to protect human health and welfare. The first prong is to prevent or minimize any increases in existing levels of pollution. This policy is embodied in Section 111(b) of the Act, 42 U.S.C. 7411(b), which authorizes a system of rigorous, nationally uniform emission standards that apply to new sources of pollution and to existing sources from which emissions are increased. These standards, known as new source performance standards (NSPS), specify the maximum permissible amounts of various pollutants that may be emitted from newly constructed sources and from existing sources that have undergone a "modification." § 111(a)(2), 42 U.S.C. 7411(a)(2). The term "modification" is defined in Section 111(a)(4), 42 U.S.C. 7411(a)(4), as follows:

> The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

The second prong of Congress's strategy for attaining clean air is the reduction of emissions from existing, unmodified sources. One of several provisions intended to achieve this goal is Section 111(d) of the Act, 42 U.S.C. 7411(d), which provides for the States, with EPA approval, to adopt plans that include measures for reduction of emissions from existing sources of pollutants for which EPA has not

promulgated national ambient air quality standards or national emission standards for hazardous air pollutants.[1] Fluoride, which is involved in this case, is one such pollutant. In the case of these pollutants, Section 111(d) requires the States to establish standards of performance for existing, unmodified sources that would be subject to the NSPS if they were new or modified.

2. Petitioner National-Southwire Aluminum Company owns and operates a primary aluminum reduction plant in Hawesville, Kentucky, that emits fluoride in both gaseous and particulate forms. When the plant was constructed in 1969, before passage of the Clean Air Amendments of 1970, petitioner equipped the plant with wet scrubbers to control emissions of gaseous fluoride. After passage of the Clean Air Amendments, EPA determined that fluoride air pollution presents a serious threat to public welfare because it damages natural vegetation, herbivorous animals, and agricultural crops. On October 23, 1974, EPA promulgated NSPS for fluoride emissions from new and modified primary aluminum reduction plants. See 39 Fed. Reg. 37730. Kentucky was then required by Section 111(d) of the Act to adopt state standards limiting fluoride emissions from existing,

---

[1] EPA has set national ambient air quality standards for six pollutants: lead, ozone, carbon monoxide, sulfur dioxide, nitrogen dioxide, and particulate matter. See 40 C.F.R. Pt. 50. For these pollutants, the States are required by Section 110 of the Act to set emission standards for individual sources that are sufficiently stringent to prevent the combined pollution from all sources from exceeding the ambient air quality standards. See generally *Train* v. *NRDC, Inc.*, 421 U.S. 60, 63-67 (1975). EPA's national emission standards for hazardous air pollutants are listed in 40 C.F.R. Pt. 61, and do not apply to fluorides.

unmodified plants. Kentucky first adopted such standards in 1981, and they were approved by EPA in 1982. These standards had the effect of preventing any increase in the emission of gaseous fluorides from petitioner's Hawesville plant, but did not require petitioner to reduce those emissions. Pet. App. 3a-4a.

Thereafter, petitioner proposed to shut down the wet scrubbers at the Hawesville plant. According to data supplied to EPA by petitioner, that action would increase fluoride emissions from the plant by 1,174 tons per year.[2] Petitioner sought and obtained from Kentucky a relaxation of the State's Section 111(d) gaseous fluoride emission standard to the extent necessary to permit that increase. The relaxation, however, is not effective unless and until it is approved by EPA. See 40 C.F.R. 60.23, 60.27. Kentucky submitted a proposed form of its relaxed Section 111(d) standard to EPA for comment on March 22, 1985. The proposal included a stipulation that if petitioner turned off the wet scrubbers at its plant to take advantage of the relaxed standard, such a change in its method of operation would not be considered a "modification" that would render the plant subject to the NSPS. EPA informed Kentucky that the latter provision would not be approved. Nevertheless, on April 3, 1986, Kentucky submitted for EPA's final approval a relaxed Section 111(d) standard that includes the same stipulation. Pet. App. 4a-5a. That submission is pending before EPA.

---

[2] EPA has determined that the de minimis level for fluoride emissions is three tons per year and that emissions in excess of that amount could cause damage to vegetation. 45 Fed. Reg. 52676, 52709 (1980); 40 C.F.R. 52.21(b)(23)(i). Thus, the proposed 1,174-ton annual increase is nearly 400 times the level that EPA has found to be significant. Pet. App. 12a n.8.

On August 27, 1986, petitioner requested a formal determination from EPA, pursuant to 40 C.F.R. 60.5, whether turning off the wet scrubbers at its plant would be a "modification" of a stationary source that would trigger application of the NSPS for flouride emissions. On September 22, 1986, EPA rendered a decision rejecting petitioner's contention that pollution control equipment is not part of the stationary source and concluding that turning off the scrubbers at petitioner's plant would be a modification (Pet. App. 19a-26a). EPA reasoned that the exclusion of pollution control equipment from the definition of "stationary source" would be "contrary to the plain words of the definition" and that "inclusion of air pollution control equipment as part of a stationary source is essential if the Administrator is to implement Section 111(b)" (*id.* at 21a).

3. Petitioner then sought review in the United States Court of Appeals for the Sixth Circuit, which sustained EPA's decision (Pet. App. 1a-14a). The court first rejected petitioner's contention that a "stationary source" encompasses only pollution generating equipment and therefore does not encompass an emission control system (*id.* at 8a-10a). The court reasoned that although the statutory definition of the term "stationary source" does not specifically mention pre-existing pollution control equipment, such equipment is not excluded from the definition's sweep (*id.* at 8a). Moreover, the court noted that EPA concluded when it amended the applicable regulations in 1975 that pollution control equipment is included as part of a stationary source.[3] The court found this in-

[3] On that occasion, EPA determined that if increases in pollution resulting from an operational change are offset by improvements in an existing pollution control system, the

terpretation "reasonable and not inconsistent with the statutory language," and therefore entitled to deference (*id.* at 9a-10a).

The court of appeals next held that turning off the wet scrubbers at petitioner's plant would not fall within a regulatory exception stating that the term "modification" shall not be considered to include "[t]he addition or use of any system or device whose primary function is the reduction of air pollutants, except when an emission control system is removed or is replaced by a system which the Administrator determines to be less environmentally beneficial" (40 C.F.R. 60.14(e)(5)). The court stressed that the exception does not apply to the "removal" of a pollution control system, and it explained that even the replacement of one pollution control system with another constitutes a modification if the Administrator determines that the replacement would be less environmentally beneficial, which would be the result in this case because petitioner's proposal "would leave gaseous fluorides virtually uncontrolled" (Pet. App. 10a-11a).

Finally, the court found no inconsistency between EPA's interpretation of the terms "stationary source" and "modification" and the primary role of the States in developing plans under Section 111(d) for the control of pollutants emitted from existing, unmodified plants. In the court's view, Section 111 (b) "was 'designed to prevent new [air] pollution problems' by regulating both newly-constructed sources of pollution and sources that increase their emissions," and "[t]he effect of including modified as well as newly-constructed sources under its pro-

---

change would not be regarded as a modification (Pet. App. 9a, citing 30 Fed. Reg. 36946 (1974)).

visions is to establish existing levels of emissions as a baseline above which an existing source may not pollute without becoming subject to the NSPS" (Pet. App. 13a, quoting *National Asphalt Pavement Ass'n* v. *Train*, 539 F.2d 775, 783 (D.C. Cir. 1976)). "[I]t is clear," the court concluded, "that Congress intended that federal enforcement of federal air pollution standards governing new or modified stationary sources not be controlled by the states" (Pet. App. 14a).[4]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. The petition for a writ of certiorari therefore should be denied.

1. EPA's determination that turning off the scrubbers at petitioner's plant would constitute a "modification" is based on a straightforward application of the statutory definition of that term. Section 111(a)(4) of the Act, 42 U.S.C. 7411(a)(4) (emphasis added), provides:

> The term "modification" means any physical change in, or *change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source* or which results in the emission of any air pollutant not previously emitted.

Petitioner's aluminum reduction plant is a "stationary source" of fluoride emissions, and operating the plant without the wet scrubbers is unquestionably a "change in the method of operation" of that source. Furthermore, it is undisputed that turning off the scrubbers would "increase[] the amount of [fluoride]

---

[4] Judge Boggs filed a dissenting opinion (Pet. App. 15a-18a).

air pollutant emitted" by approximately 1,174 tons per year. Thus, by the express terms of Section 111 (a)(4), turning off the scrubbers would constitute a "modification" of an existing source that, in turn, would trigger the application of the nationally uniform NSPS for fluoride emissions. As the court of appeals observed (Pet. App. 8a-9a), EPA has interpreted the statutory provisions in this manner since 1975, when it amended the implementing regulations. At the very least, this longstanding administrative position "is based on a permissible construction of the statute," and it therefore is binding on the courts. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 843 (1984).

2. Petitioner makes no attempt to answer this analysis of the text and administrative interpretation of the relevant statutory provisions. Petitioner argues (Pet. 11-14), however, that EPA's decision in this case is contrary to the legislative intent underlying Section 111, because that section allows the States to regulate emissions from existing sources of pollution. This argument rests on an erroneous view of the ambit of the States' regulatory authority. Although Congress did not intend to require that *all* existing sources be retrofitted to comply with the NSPS, Congress expressly provided in Section 111 (a)(2) that those existing sources that undergo a "modification" must comply with the NSPS. Section 111 thus was intended "to prevent new air pollution problems" that might result from new sources or the modification of existing sources. S. Rep. 91-1196, 91st Cong., 2d Sess. 16 (1970).[5] For this reason,

---

[5] See also H.R. Rep. 91-1146, 91st Cong., 2d Sess. 10 (1970) ("new sources may take the form either of entirely new facilities or expanded or modified facilities, or of expanded or

EPA's determination that the proposed change in the operation of petitioner's plant would constitute a modification because it would substantially increase fluoride emissions is fully consistent with the purposes of Section 111.

3. Petitioner's contention (Pet. 12-13) that EPA's interpretation, sustained by the court of appeals, would "prevent a State from correcting overly strict non-health-related emission standards" is both erroneous and irrelevant. EPA's determination in this case does not invalidate Kentucky's amendment of its Section 111(d) standard for the emission of gaseous fluorides from existing sources. Once approved by EPA, the state standard will have the force and effect of law. However, the effect of the relaxed standard is only that the state plan will not prohibit increased emissions. Such an amendment of a state plan does not serve to exempt an existing source from the overriding federal standards in the NSPS if increased emissions permitted by the state plan result from a "modification" of the source—as the increased emission of 1,174 tons of fluoride annually from petitioner's plant clearly do.

In addition, although EPA's determination regarding petitioner's proposal to shut down its pollution control equipment does have the effect in this case of preventing petitioner from taking full advantage of the State's relaxation of its Section 111(d) standard, and to that extent limits the practical impact of the State's action, that incidental effect at most implicates secondary policy considerations concerning the role of the States under the Clean Air Amendments; those considerations furnish no basis for ignoring the

---

modified operations which result in substantially increased pollution").

"unambiguously expressed intent of Congress" (*Chevron*, 467 U.S. at 842-843) to require modified sources to comply with the NSPS.[6] There is no evidence of a congressional intent to exempt from the NSPS a modification of an existing facility that causes substantial increase in emissions, simply in order to enable a discharger of pollutants to take advantage of a relaxed Section 111(d) standard.

4. Finally, petitioner contends (Pet. 15-16) that the court of appeals erred in concluding that the EPA regulation that exempts specific actions from being considered "modifications" does not apply to petitioner's proposal to turn off its scrubbers. This contention is without merit and does not warrant review by this Court.

The regulation in question provides that the following does not constitute a modification (40 C.F.R. 60.14(e)(5)):

> The addition or use of any system or device whose primary function is the reduction of air pollutants, except when an emission control system is removed or is replaced by a system which the Administrator determines to be less environmentally beneficial.

This regulation is inapplicable here for a number of reasons. First, turning off the scrubbers is not the "addition or use" of a pollution control system; as

---

[6] The other policy consideration petitioner advances (Pet. 13-14)—that the court of appeals' ruling "would discourage voluntary pollution control"—likewise cannot override the explicit statement of congressional intent embodied in Section 111. Moreover, there is no reason to anticipate such a deterrent effect in the unusual circumstances of this case, which involve pollution control equipment that was voluntarily installed before the Clean Air Amendments of 1970 were passed and that remains functional and effective to this day.

the court of appeals observed, petitioner's proposal "contemplates the non-use, or *subtraction* of a pollution control device" (Pet. App. 11a (emphasis in original)). Second, the exception is expressly inapplicable to the "removal" of an emission control system, which is essentially what petitioner seeks to accomplish. Third, the exception also is expressly inapplicable to the replacement of one pollution control system by another that the Administrator finds to be "less environmentally beneficial"; here, petitioner does not even seek to "replace" its scrubbers with equally or more effective emission control equipment, and turning off the scrubbers would in any event be "less environmentally beneficial" because it would increase fluoride emissions 400-fold and "leave gaseous fluorides virtually uncontrolled" (Pet. App. 11a, 12a).[7] Finally, petitioner's interpretation of the statutory term "modification" and the regulatory exception to that term would be inconsistent with Con-

---

[7] Petitioner claims (Pet. 15-16) that the court of appeals usurped the Administrator's role by holding that petitioner's proposal would be "less environmentally beneficial." Petitioner relies on the language of the regulation stating that the exception is inapplicable to a replacement of old equipment by a new system "which the Administrator determines" to be less beneficial (40 C.F.R. 60.14(e)(5)). The court below should not be faulted on this ground, because petitioner did not rely on the regulatory exception in proceedings before the Administrator (Pet. App. 10a) and therefore did not give the Administrator an opportunity to address the issue. Moreover, it is clear in this case that petitioner's proposal would be less environmentally beneficial, since it *would* result in a substantial increase in fluoride emissions that would not be offset by a decrease in emissions of another pollutant. See note 8, *infra*.

gress's overriding goal of achieving "maximum feasible control" of air pollutants (*id.* at 11a).[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROGER J. MARZULLA
Assistant Attorney General

BRIAN FALLER
Attorney

OCTOBER 1988

---

[8] As the court of appeals explained, the regulation upon which petitioner relies was intended to be a "*de minimis* exception * * * to permit a source to install a pollution control system that would bring about a major decrease in emissions of one pollutant while causing a smaller, incidental increase in emissions of another pollutant" (Pet. App. 10a, 11a, citing 39 Fed. Reg. 36948 (1974)). In this case, the increase in fluoride emissions would not be the "incidental" consequence of efforts to control emissions of another pollutant; it would be the direct consequence of the simple *decontrol* of the emission of fluorides. Moreover, the 1,174-ton increase in fluoride emissions that petitioner's proposal would bring about each year can scarcely be termed de minimis (Pet. App. 12a).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1988 202037 60727

(1)

88-315

Supreme Court, U.S.
FILED
JUN 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NATIONAL-SOUTHWIRE ALUMINUM COMPANY,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
LEE A. THOMAS, Administrator, and
JACK E. RAVEN, Regional Administrator,
Respondents.

ON WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

APPENDIX A TO PETITION FOR WRIT OF CERTIORARI

Chester R. Babst III, Esquire
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center
Pittsburgh, Pennsylvania 15222

Counsel of Record for Petitioner
National-Southwire Aluminum Company

No. _____

NATIONAL-SOUTHWIRE ALUMINUM COMPANY,
Petitioner,

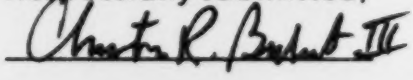
v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
LEE A. THOMAS, Administrator, and
JACK E. RAVEN, Regional Administrator
Respondents.

APPENDIX A TO PETITION FOR WRIT OF CERTIORARI

Petitioner, National-Southwire Aluminum Company, by its attorneys Babst, Calland, Clements & Zomnir, P.C., files the following Appendix A for the above-captioned Petition for Writ of Certiorari.

Respectfully submitted,



Chester R. Babst III, Esquire
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel of Record for Petitioner
National-Southwire Aluminum Company

TABLE OF CONTENTS

APPENDIX A — Page

Opinion of the Court of Appeals by Guy, Cir. J. filed February 1988 ..... 1a

Formal Determination of Environmental Protection Agency dated September 22, 1986 ..... 19a

Judgment of the Court of Appeals entered April 6, 1988 ..... 27a

Order of the Court of Appeals denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc entered March 25, 1988 ..... 29a

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 86-3982

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NATIONAL-SOUTHWIRE ALUMINUM CO.,
Petitioner-Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; LEE A. THOMAS, Administrator; and JACK E. RAVEN, Regional Administrator,
Respondents-Appellees.

ON PETITION to Review a Decision of the U.S. Environmental Protection Agency.

Decided and Filed February 1, 1988

Before: GUY and BOGGS, Circuit Judges; and WOODS, District Judge.*

GUY, Circuit Judge, delivered the opinion of the court, in which WOODS, District Judge, joined. BOGGS, Circuit Judge, (pp. 15-18) delivered a separate dissenting opinion.

---

*Honorable George E. Woods, United States District Court for the Eastern District of Michigan, sitting by designation.

GUY, Circuit Judge. National-Southwire Aluminum Company (NSA) petitions this court for review of a determination by the United States Environmental Protection Agency (EPA) that the turning off of certain pollution control equipment (i.e., wet scrubbers) at NSA's aluminum reduction plant in Hawesville, Kentucky, would constitute a "modification" of a stationary source within the meaning of section 111(a)(4) of the Clean Air Act, 42 U.S.C. § 7411(a)(4). If turning off the equipment is such a modification, the plant would be subject to the New Source Performance Standards (NSPS) promulgated by the EPA pursuant to section 111(b) of the Act, 42 U.S.C. § 7411(b), which, NSA claims, could only be met by tearing out the wet scrubbers and installing a new system utilizing dry scrubbers at a prohibitive expense.

The EPA's determination was issued pursuant to 40 C.F.R. § 60.5 which requires the Agency, at the request of an owner or operator of a source of pollution, to determine whether a proposed action would be a modification of the source. The EPA's determination is a final agency action subject to judicial review in the court of appeals under section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1). The standard of review of an EPA determination of NSPS applicability is specified in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), which provides that agency action may be set aside only if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Because we do not find the EPA's determination here to have been arbitrary or capricious, the petition will be denied.

I.

NSA owns and operates a primary aluminum reduction plant which emits fluoride in both gaseous and particulate forms. The EPA has determined that fluoride air pollution presents a serious threat to public welfare by injuring natural vegetation, herbivorous animals, and agricultural crops. *See*

39 Fed. Reg. 37,730 (1974).[1] As a welfare-related pollutant, regulation of fluoride emissions is based upon the requirements of section 111(d) of the Act, which provides in pertinent part that:

> [E]ach State shall submit to the Administration a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued ... but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance.

42 U.S.C. § 7411(d).

The EPA promulgated NSPS for fluoride emissions from new and modified primary aluminum reduction plants on October 23, 1974. *See* 39 Fed. Reg. 37,730. Kentucky was then required, under section 111(d), to adopt state standards to limit fluoride emissions from existing, unmodified plants, which included NSA. At the time of construction of the plant in 1969, before passage of the Clean Air Act, NSA equipped the plant with wet scrubbers, which represented the best known technology at that time for the control of emissions of gaseous fluoride. Kentucky adopted its standards in 1981 and the EPA approved Kentucky's standards in 1982. These standards did not require NSA to reduce the gaseous fluoride emissions from its Hawesville plant but simply required the

[1]Regulated pollutants under the Clean Air Act are either "health-related," based upon a link between exposure and human health problems, or "welfare-related," based upon a demonstrated relationship between exposure and damage to animals or vegetation. Certain "welfare-related" pollutants may be converted to a "health-related" risk based upon increasingly sophisticated testing methods or elapsed time documentation.

same level of emission control that NSA had been achieving with its wet scrubbers since 1969.[2]

In 1982, during a routine maintenance-related shutdown of the wet scrubbers, NSA observed that its ambient air monitors did not detect any appreciable change in ambient fluoride levels as a result of not scrubbing the exhaust gases.[3] Because of the substantial cost of operating the wet scrubbers, NSA sought and obtained from Kentucky a relaxation of the state's section 111(d) standard by a factor of thirteen, from 1.0 pounds of fluoride emitted per ton of aluminum produced to 290 pounds of fluoride emitted per hour, the equivalent of 13.18 pounds of fluoride per ton of aluminum. This action results in increasing gaseous fluoride emissions from the plant by 1,174 tons per year. This relaxation is not effective, however, unless and until it is approved by the EPA. *See* 40 C.F.R. §§ 60.23, 60.27.

Kentucky submitted a proposed form of its relaxed 111(d) standard to the EPA for comment on March 22, 1985. This proposed regulation included a stipulation to the effect that

---

[2]The NSPS established by the EPA would impose a maximum rate of 1.9 pounds per ton of aluminum for *both* primary and secondary emissions from new and modified sources. *See generally* 40 C.F.R., Part 60, Subpart S, § 60.192. Kentucky's original standard included, *inter alia*, a 1.0 pound gaseous fluoride per ton limitation for primary emissions and a 3.25 pounds per hour limitation for secondary emissions.

[3]An ambient air quality standard differs from an emission or performance standard, such as a NSPS. An ambient air quality standard specifies a maximum pollutant concentration in the ambient air, while a performance standard specifies the maximum rate at which an individual source may emit pollution. The EPA has set national ambient air quality standards for only six pollutants: lead, ozone, carbon monoxide, sulfur dioxide, nitrogen dioxide, and particulate matter. *See* 40 C.F.R. Part 50 (1986). Since ambient air quality standards have not been set for gaseous fluoride emissions, such measurements are not meaningfully transferrable to these emissions.

if NSA turned off the wet scrubbers at its plant to take advantage of the relaxed section 111(d) standard, such a change in method of operation would not be considered a "modification" that would render the plant subject to the NSPS.[4] Section 111(a)(4) of the Act defines a modification as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source." Despite having been informed by the EPA that this latter stipulation would not be approved, the revised standard submitted for final approval on April 3, 1986, included the stipulation.

On August 27, 1986, the EPA received NSA's request for a formal determination of whether the turning off of the wet scrubbers would be a modification that would trigger application of the NSPS. In making its request, NSA argued that such change should not be considered a modification because (1) pollution control equipment is not part of a "stationary source," and therefore turning off such equipment is not a modification of such a source, and (2) NSA's plant is an existing facility subject to state regulation under section 111(d) and therefore cannot be subject to the NSPS.

On September 22, 1986, the EPA issued the determination which is the subject of this appeal. The Agency concluded that, under the plain words of the statute, pollution control equipment is part of a stationary source, and changes in such equipment that cause increases in emissions are modifications of the source within the meaning of section 111(a)(4). It also determined that, under the plain words of both the statute and the EPA's regulations, an existing facility becomes subject to the NSPS when it undergoes a modification. On December 2, 1986, the EPA issued a notice of pro-

---

[4]The modification of an existing source renders it a "new source" as defined in 42 U.S.C. § 7411(a)(2). All "new sources" are required to comply with the NSPS. *See* 42 U.S.C. § 7411(e).

posed rulemaking (51 Fed. Reg. 43,395) proposing to approve Kentucky's relaxed standard but to take no action on the purported exemption from application of the NSPS since that provision is outside the scope of state regulation authorized by section 111(d). The proposed approval was based on the statutory scheme which gives substantial latitude to the states in setting emission standards for welfare-related pollutants generated by local facilities but does not speak directly to the potential impact of other sections of the Act on revisions of those standards.

II.

Our standard of review is a deferential one that presumes the validity of agency action. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971). The EPA determination under review in this case hinges on the interpretation of section 111 of the Clean Air Act and of the EPA's regulations implementing that section. The Supreme Court has established a two-step procedure for judicial review of statutory construction by an administrative agency. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . ." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843 (footnote omitted). "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844 (footnote omitted).

This court has recognized the mandate of the Supreme Court that " 'great deference' be accorded the 'interpretation given [a] statute by the officers or agency charged with its administration.' " *McCown v. Secretary of HHS*, 796 F.2d 151, 157 (6th Cir. 1986) (quoting *Udall v. Tallman*, 380 U.S.

1, 16 (1965)). We have observed that, in reviewing agency action under section 706 of the Administrative Procedure Act, "[w]e are, therefore, normally 'bound by the principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.' " *United States Air Force v. FLRA*, 681 F.2d 466, 467 (6th Cir. 1982) (quoting *Miller v. Youakim*, 440 U.S. 125, 145 n.25 (1979); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)).

In this case, the EPA's interpretation of the Clean Air Act is embodied in its regulations. The Agency's interpretation of its own regulations is entitled to special deference. " 'When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.' " *Compton v. Tennessee Dep't of Public Welfare*, 532 F.2d 561, 565 (6th Cir. 1976) (quoting *Udall*, 380 U.S. at 16-17). As this court and the Supreme Court have explained:

> Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt.... "[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."

Compton, 532 F.2d at 565 (quoting *Udall*, 380 U.S. at 16-17; *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14 (1945)).

III.

NSA raises three arguments on appeal:

> 1. an emission control system is not included within the statutory definition of a "stationary source";

2. the proposed change in the operation of NSA's emission control system does not constitute a "modification" of an existing facility; and

3. the imposition of NSPS would be inconsistent with the legislative intent behind section 111 of the Clean Air Act and regulations thereunder.

NSA claims that a "stationary source" consists only of pollution generating equipment, and does not include attached air pollution control equipment. Therefore, it argues, the turning off of its wet scrubbers would not constitute a "modification" of a "stationary source." Under this theory, the existence of a modification would depend on the amount of pollutant created by the pollution-generating equipment, without regard to the amount of pollution actually emitted into the atmosphere after the pollution-control equipment has done its work.

Section 111(a)(4) of the Act, 42 U.S.C. § 7411(a)(4) provides:

> The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

Section 111(a)(3), 42 U.S.C. § 7411(a)(3), defines the term "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." Clearly, while the statutory definition does not specifically reference or include pre-existing pollution control equipment, it certainly does not exclude it either. Moreover, the EPA explicitly considered and rejected NSA's theory when the agency amended the applicable regulations in 1975. The current regulations define "modification" to include any change in the method of operation of "an existing facility

which increases the amount of any air pollutant . . . emitted into the atmosphere . . . ." 40 C.F.R. § 60.2. *See also* 40 C.F.R. § 60.14(a) (any change "which results in an increase in the emission rate *to the atmosphere*" constitutes a modification (emphasis added)). As the EPA explained at the time it proposed the amendments:

> The new phrase ['emitted into the atmosphere'] clarifies that for an existing facility to undergo a modification there must be an increase in actual emissions . . . . The Administrator considered defining "modification" so that increases in pre-controlled (potential) emissions would be modifications. However, the proposed definition of modification is limited to increases in actual emissions.

39 Fed. Reg. 36, 946 (October 15, 1974). As the agency further explained:

> If any increase in emissions that would result from a physical or operational change to an existing facility can be offset by improving an existing control system for that facility, such a change would not be considered a modification because there would be no increase in emissions to the atmosphere.

Id. It is clear from the foregoing that the agency considered such a definition to be a limiting one which would allow a facility to change or add to its operation such that increased pollution would be *generated* but would not constitute a modification provided such increase were *offset* by a corresponding increase in the effectiveness of its pollution control mechanisms. These regulations were duly promulgated by the agency on December 16, 1975, and may not be challenged in this appeal.[5] As a result, we find the agency's interpretation

---

[5]Since these regulations are nationally applicable, they may be challenged only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit within 60 days of their promulgation. *See* section 301(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1); *Motor Vehicle Manufacturers' Ass'n v. Costle*, 647 F.2d 675, 677 n.3 (6th Cir. 1981).

of the term "stationary source" as including a structure's pollution control equipment to be reasonable and not inconsistent with the statutory language.

NSA next argues that its proposed change in operations falls within the following regulatory exception to the definition of "modification":

> The following shall not, by themselves, be considered modifications under this part:
>
> . . . .
>
> (5) The addition or use of any system or device whose primary function is the reduction of air pollutants, except when an emission control system is removed or is replaced by a system which the Administrator determines to be less environmentally beneficial.

40 C.F.R. § 60.14(e)(5). Although NSA did not specifically raise this argument below, we will address it here since the governing regulation, 40 C.F.R. § 60.5, requires the Administrator to render a decision on whether a proposed action will constitute a modification "within the meaning of this part," and the exception NSA now urges is contained within part 60.

NSA's proposal to turn off a portion of its air pollution control equipment does not fit within the delineated exception. By its terms, the regulation does not apply to the *removal* of such a system, nor to the replacement of such a system with one that is "less environmentally beneficial." The purpose of this *de minimis* exception is to permit a source to install a pollution control system that would bring about a major decrease in emissions of one pollutant while causing a smaller, incidental increase in emissions of another pollutant. "The exemption . . . would exempt changes such as the addition of an afterburner to a control system to reduce odors even though particulate emissions may increase due to the

afterburner." 39 Fed. Reg. 36,948 (October 15, 1974). Rather than an "addition or use" of a pollution control system, NSA's proposal contemplates the non-use, or *subtraction* of a pollution control device, i.e., the wet scrubbers.

It should be noted that this "replacement" system would leave gaseous fluorides virtually uncontrolled.[6] Such result would be incompatible with a major purpose of the Clean Air Act — to prevent or minimize any increases in existing levels of pollution. This philosophy is embodied in 42 U.S.C. § 7411(b), which authorizes a system of nationally uniform emission standards that apply to both newly-constructed sources of pollution and to existing sources that increase their emissions. *ASARCO, Inc. v. EPA,* 578 F.2d 319, 321-22 (D.C. Cir. 1978). This purpose was unequivocally expressed by Congress. "The maximum use of available means of preventing and controlling air pollution is essential to the elimination of new pollution problems while cleaning up existing sources." S. Rep. No. 1196, 91st Cong., 2d Sess. at 16, *reprinted in* 1 Senate Committee on Public Works, A Legislative History of the Clean Air Act Amendments of 1970, at 416. "[T]he emission standards shall provide that sources of such emissions shall be designed and equipped to prevent and control such emissions to the fullest extent compatible with the available technology and economic feasibility." H.R. Rep. No. 1146, 91st Cong., 2d Sess., at 10, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5356, 5365.

It is inconsistent with the Congressional purpose of maximum feasible control to have existing, functional air pollution control equipment sitting idle while the pollution that

---

[6]The elements of NSA's system, minus the wet scrubbers, would be hoods, multicyclones, dry electrostatic precipitators (ESPs), and a smokestack. The hoods merely funnel emissions to the control devices; the multicyclones and ESPs remove fluoride particles but do not substantially affect gaseous fluoride emissions; and the smokestack simply disperses the emissions into the atmosphere but does not reduce them.

the equipment could be preventing escapes into the atmosphere. The turning off of NSA's wet scrubbers would result in an increase of 1,174 tons per year of fluoride emissions with no decrease whatsoever in the emission of any other pollutant.[7] It is apparent that such a changed system would be *substantially* "less environmentally beneficial" and cannot be deemed so *de minimis* as to qualify it for exemption under 40 C.F.R. § 60.14(e)(5).[8]

Finally, NSA argues that imposition of the NSPS under the facts of this case would be inconsistent with the purposes of section 111 of the Act. In essence it argues that, since the states have been given primary responsibility for developing

---

[7]NSA makes much of the fact that the EPA has proposed to approve Kentucky's relaxed section 111(d) standard, acknowledging the State's evidence that the relaxation would have "insignificant environmental impact." *See* 51 Fed. Reg. 43,395 (December 2, 1986). The EPA proposed approval of the relaxed standard because of the Agency's preliminary determination that the balance that the State had struck between economic and environmental impacts was within the latitude given the State under section 111(d). There is no such latitude, however, in determining whether a change in a plant constitutes a "modification" within the meaning of section 111(a)(4) which would trigger application of section 111(b)'s NSPS. The regulatory scheme calls for the consideration of costs and other factors in setting the level of the NSPS, *see* 42 U.S.C. § 7411(a)(1)(C), but once that level is set, the standards apply uniformly to all new and modified sources. Therefore, the question of approval of a state's proposed relaxed standard under 111(d) is a wholly separate inquiry from the question whether such relaxation constitutes a "modification" for purposes of section 111(a)(4).

[8]The EPA has established levels of emissions of various pollutants, including fluorides, that the agency considers *de minimis* for purposes of its program for the prevention of significant deterioration of air quality under Part C of the Clean Air Act. *See* 42 U.S.C. §§ 7470-7479. The *de minimis* level for fluoride emissions was determined to be three (3) tons per year. 40 C.F.R. § 52.21(b)(23)(i). The Agency found that fluoride emissions greater than three tons per year could cause damage to vegetation. *See* Fed. Reg. at 52,709. Thus, the proposed 1,174 tons per year increase from NSA's plant is nearly *four hundred times* the level that the EPA has found to be significant.

and enforcing control plans under section 111(d), the imposition of NSPS under section 111(b) would undermine the states' authority under section 111(d). As we have noted, section 111(b) was "designed to prevent new [air] pollution problems" by regulating both newly-constructed sources of pollution and sources that increase their emissions. *National Asphalt Pavement Ass'n v. Train*, 539 F.2d 775, 783 (D.C. Cir. 1976). The effect of including modified as well as newly-constructed sources under its provisions is to establish existing levels of emissions as a baseline above which an existing source may not pollute without becoming subject to the NSPS. As the Court of Appeals for the District of Columbia has explained:

> [T]he operator of an existing facility can make any alterations he wishes in the facility without becoming subject to the NSPS *as long as the level of emissions from the altered facility does not increase.* Thus, the level of emissions before alterations take place ... effectively defines the standard that an altered facility must meet.

ASARCO, 578 F.2d at 328-29 (emphasis in original).

Section 111(d) requires states to develop, and submit to the EPA for approval, plans that include measures for the reduction of emissions from unmodified, existing sources, of those pollutants for which the EPA has not promulgated national ambient air quality standards, but for which the Agency has promulgated NSPS under section 111(b). In this case, Kentucky's first section 111(d) standard was adopted in 1981 and required nothing more of NSA than to continue operating the scrubbers as it had been doing. NSA now claims that because Kentucky adopted its original standard "in error" and now wishes to relax that standard further, it should be exempt from the NSPS. If accepted, this argument would render the "modification" provisions of section 111(b) meaningless by authorizing unlimited increases in emissions from

existing sources so long as the increases do not violate state standards under section 111(d). However, it is clear that Congress intended that federal enforcement of federal air pollution standards governing new or modified stationary sources not be controlled by the states. *United States v. City of Painesville,* 431 F. Supp. 496, 501 n.9 (N.D. Ohio 1977), *aff'd,* 644 F.2d 1186 (6th Cir.), *cert. denied,* 454 U.S. 894 (1981) (state law may not determine what sources are subject to NSPS). See *also National Asphalt,* 539 F.2d at 785 (state regulations designed to reduce emissions do not preempt EPA authority to prevent increases).

The EPA's determination will require NSA either to continue operating its existing wet scrubbers (and thereby avoid application of the NSPS) or to install new control equipment. If, as NSA claims, the latter option is prohibitively expensive, then presumably the company will choose the former option. In contrast to NSA's proposed plan permitting vastly *increased* fluoride emissions, either of the above options will further the Act's stated purpose of protecting and enhancing the quality of the nation's air by virtue of increased federal participation. *ASARCO,* 578 F.2d at 321 (citing *Train v. Natural Resources Defense Council, Inc.,* 421 U.S. 60, 64 (1975)).

In conclusion, since we find the EPA's interpretation of the governing statute and implementing regulations rational and consistent with the purposes that inspired the Clean Air Act, NSA's petition will be DENIED.

BOGGS, Circuit Judge, dissenting. This case involves assessing EPA's resolution of a conflict between two principles of the Clean Air Act. The first principle is that individual states are allowed to set their own "welfare-related" standards for pollution, though not health-related standards. That is, states can decide for themselves what costs they wish to impose for what level of protection of vegetation and inanimate objects. This policy is clearly spelled out in Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d).

The second policy is that nationwide New Source Performance Standards (NSPS) should apply to new or "modified" sources of pollution, so as to address pollution problems when those problems are easiest to fix, at the time of the new construction. See Section 111(b) of the Clean Air Act, 42 U.S.C. § 7411(b). In the particular case before us, the first principle can be accommodated without any significant damage to the second. EPA's resolution of this controversy does not do that. Rather, it exalts formalistic rather than actual adherence to the second principle, while completely vitiating the first. I think this is an unreasonable construction of the agency's authority and thus violates the standard set forth in *Chevron* v. *Natural Resources Defense Council,* 467 U.S. 837, 845 (1984). With regard to the application of the NSPS to a change in the operation of a pollution control system, I cannot find that "the Administrator's view that it is appropriate in the context is a reasonable one." *Ibid.* I therefore respectfully dissent.

It is important to recognize that the current conflict is, in effect, an accident of timing. National Southwire originally installed its wet scrubbers in 1969 voluntarily. Had it not installed them in 1969, it would not have been subject to a requirement to do so until December 1981. Had it simply challenged enforcement of those first Kentucky standards, it could almost certainly have delayed until Kentucky proposed its new standards, without having to install the pollution control equipment it now has in place. It then cheerfully would

have been granted the exemption it seeks, for failure to install the scrubbers would not be a "modification." As early as March 1983, Kentucky granted an exemption permitting operation without wet scrubbers. No decrease in ambient air quality was noted during three years of operation without the scrubbers.

Similarly, had Kentucky in December 1981 taken the position which Kentucky now takes (and took as early as March 1983), the company would clearly not be forced to operate the wet scrubbers.

A state is free, with EPA approval, to reduce the welfare-related standards that it sets for pollution, and Kentucky would have been free to set originally the standard for which it has now obtained EPA's approval. Thus, EPA's interpretation in two ways applies a "minnow-trap" type of enforcement, where any step at any time towards pollution control is fatal to any effort at later reevaluation. It minnow-traps this particular facility for its early and voluntary pollution control activity and also effectively minnow-traps Kentucky for having initially taken a more stringent approach, even though Kentucky now deems its earlier policy unwise.

As a general matter, this hardly seems a sensible strategy. It might conceivably achieve some actual benefits in a single case (although that is contradicted in this case[1]), but it creates a national enforcement strategy completely hostile to any willing compliance with pollution control standards.

The most compelling argument in favor of EPA's interpretation, well expressed at pages 13-14 of the court's opinion, is that acceptance of National Southwire's argument means that a state would, *in general*, be able to override the require-

---

[1]Company monitoring, accepted by both Kentucky and EPA as far as it goes, indicates that turning off the scrubbers creates *no* increase in concentrations of fluoride in the atmosphere.

ment to apply NSPS to "modified" plants. This would be a serious matter, as the NSPS is a major part of Congress's plans to control and reduce pollution.

Fortunately, resolution of this case in accordance with Kentucky's desires, does not, in my opinion, create such a precedent. The purpose of the "modification" rule is to ensure that pollution control measures are undertaken when they can be most effective, at the time of new or modified construction. See 116 Cong. Rec. 32,918. (remarks of Sen. Cooper), *reprinted in* 1 Senate Committee on Public Works, A Legislative History of the Clean Air Act Amendments of 1970 (1974), at 260. Here there is no new construction, or any new modification, so there is no opportunity for effective placement of new control technology. Should there be a later decision that a higher level of pollution control is needed, the scrubbers can be turned on again. Thus, the true purposes of the modification rule are preserved in the action Kentucky and National Southwire seek.

There thus remains only the familiar question of what level of pollution control should there be, and at what cost. In many areas of environmental law, this question is explicitly or implicitly excluded from consideration. However, in the question of welfare-related standards, this is exactly the determination confided to the states, under EPA's supervision. It is exactly this judgment which the state has made and which EPA has approved. It is thus anomalous to have the effective implementation of one congressional policy thwarted by an interpretation of another policy that in this circumstance does nothing to actually advance that policy. In this particular type of circumstance, EPA's application of its general policy is unreasonable, and I would uphold Kentucky's action.

In addition, I believe that the plain intent of EPA's regulations at 40 C.F.R. § 60.14(e)(5) would permit the change sought here. That section states that it is not a modification

when there is the "use of any system . . . whose primary function is the reduction of air pollutants, except when an emission control system . . . is replaced by a system which the Administrator determines to be less environmentally beneficial." In our case National Southwire wants to replace its existing system which uses wet scrubbers and many other devices with a system to reduce air pollutants which includes all of the aspects of that system except for the wet scrubbers. This is exactly the replacement which took place between 1983 and 1986, with Kentucky's permission, and which resulted in no increase in concentration of fluoride.

If the Administrator were to make an affirmative determination that the new system is less environmentally beneficial (which might be difficult to do in the face of EPA's approval of Kentucky's reduced standards, Kentucky's approval of those standards, and the ambient air monitoring) then the Administrator might be able to avoid the operation of this section of EPA's own regulations. Otherwise, those regulations would exempt National Southwire from having to comply with prohibitively expensive new standards as the price of obtaining an accommodation that Kentucky is entitled to grant and desires to grant. However, in the absence of such a determination, I would hold that EPA's denial of the petition was unreasonable on this ground, as well.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV
345 Courtland Street
Atlanta, Georgia 30365

Ref: 4RC-WDA

September 22, 1986

Richard M. Zomnir, Esquire
Babst, Calland, Clements and Zomnir
Two Gateway Center, Eighth Floor East
Pittsburgh, Pennsylvania 15222

SUBJECT: National Southwire Aluminum, Applicability Determination Pursuant to 40 C.F.R. §60.5

Dear Mr. Zomnir:

This is in response to your August 12, 1986, request for a determination pursuant to 40 C.F.R. §60.5 as to the applicability of the provisions of 40 C.F.R. Part 60, Subpart S, to the National Southwire Aluminum (NSA) plant in Hawesville, Kentucky, in the event certain contemplated actions are taken at the plant. Specifically, you asked whether reducing the operating efficiency of the wet scrubbers, in order to benefit from a relaxed emission standard under Section 111(d) of the Clean Air Act (Act), would constitute a modification as defined in Section 111(a)(4) of the Act. It is EPA's determination that an intentional reduction in operating efficiency of the wet scrubbers that causes an increase in the emission rate of any pollutant emitted by NSA would constitute a modification and subject the affected facilities to 40 C.F.R. Part 60, Subpart S.

I
FACTUAL BACKGROUND

The factual background presented in your request can be summarized as follows. NSA is a primary aluminum reduction plant built in the late 1960's. The plant was constructed with wet scrubbers, to control both particulate and gaseous fluoride emissions. Later, electrostatic precipitators were added to better control particulate matter. The wet scrubbers were constructed and operated prior to the promulgation of 40 C.F.R. Part 60, Subpart S.

On May 26, 1982, EPA approved Kentucky's plan for controlling gaseous fluoride from existing primary aluminum reduction plants, which was required under Section 111(d) of the Act. The plant limits NSA's gaseous fluoride emissions to one pound per ton of aluminum produced through the primary control system, and to 3.25 pounds per hour through any potroom roof monitor. A revision to the plant that relaxes the standard to 290 pounds per hour for the primary control system at NSA has been submitted by Kentucky to EPA for approval, and is pending. Information submitted in support of the relaxation documents the cost of operating the wet scrubbers and assesses the environmental impact of shutting off the scrubbers; NSA believes the former to be exorbitant and the latter to be insignificant.

II
STATUTORY ARGUMENT

NSA's request presents several arguments in support of its position that the contemplated action would not constitute a modification. It first argues that applying new source performance standards (NSPS) because of this action would be inconsistent with the Act and would not make sense. The sole basis for the inconsistency argument is NSA's interpretation of the definition of "stationary source" in Section 111(a)(3) of the Act to exclude air pollution control equipment.

Thus, according to NSA, a physical change, or change in the operation of the wet scrubbers (which are air pollution control equipment) would not be a modification as defined in Section 111(a)(4).

EPA finds this argument and its underlying basis to be erroneous. Section 111(a)(4) defines a "stationary source" as "any building, structure, facility or installation which emits or has the potential to emit any air pollutant." Both process equipment and control equipment emit, or have the potential to emit, air pollutants. Little, if any, air pollution control equipment is one hundred percent efficient in design, let alone operation. Thus, the proposition that the definition of "stationary source" excludes pollution control equipment is contrary to the plain words of the definition.

Further, inclusion of air pollution control equipment as part of a stationary source is essential if the Administrator is to implement Section 111(b) and if regulated entities are to be able to comply with NSPS. The Administrator is required to promulgate standards of performance that "reflect the degree of emission limitation and the percentage reduction achievable through application of the best technological system of continuous emission reduction which . . . the Administrator determines has been adequately demonstrated." Section 111(a)(1). Owners and operators are prohibited by Section 111(e) from operating new sources in violation of any standard of performance applicable to them. And Section 111(a)(2) defines new sources as stationary sources. If NSA's argument that air pollution control equipment is not part of a stationary source were correct, the Administrator would have to prescribe, and affected facilities would have to show compliance with, a standard that reflected the best demonstrated technological system of emission reduction; yet the Administrator could not recognize and the facility could not claim the emission control of the air pollution control equipment in

demonstrating compliance with the standard, because the stationary source without control equipment would have to be operated in compliance with the standard. Such a result is impossible, and therefore NSA's interpretation cannot be correct. It is both logical and necessary to include air pollution control equipment as part of the stationary source. It follows that physical changes in, or changes in the operation of air pollution control equipment that increase the amount of air pollutants emitted is a modification as defined in Section 111(a)(4).

The case cited by NSA, North Sanitary Landfill, Inc. v. Nichols, does not construe either the term "satisfactory source" or "modification" within the context of Section 111, and is not even related to the applicability of NSPS. Rather, this case construes Ohio regulations on preconstruction review, which were apparently intended to meet the requirements of Parts C and D of the Act. An Ohio court's interpretation of these terms outside the framework of Section 111 (which contains no preconstruction review requirements) is not precedent for interpretation of Section 111.

Finally, EPA has historically interpreted the term "stationary source", as defined in Section 111(a)(3), to include control equipment. When EPA clarified what constituted a modification, it added 40 C.F.R. §60.14(e)(5) 40 Fed. Reg. 58416 which provides

> (e) the following shall not, by themselves, be considered modifications under this part:
>
> . . .
>
> (5) The addition or use of any system or device whose primary function is the reduction of air pollutants, except when an emission control system is removed or is replaced by a system which the

Administrator determines to be less environmentally beneficial. (emphasis added)

The emphasized language provides that removal of an emission control system is a modification of a stationary source. Since removal is a modification, it follows that the emission control system has to be a part of the stationary source to begin with. In the absence of any specific intent by Congress as to whether control equipment is part of a stationary source (and NSA has not presented evidence of any such intent), EPA's interpretation is entitled to a deference so long as it is reasonable. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984). As demonstrated above, EPA's interpretation is not only reasonable but necessary if Section 111 is to be implemented.

III
REGULATORY ARGUMENT

NSA argues, based upon various provisions in 40 C.F.R. Part 60, that "affected facilities" and "designated facilities" are mutually exclusive, and that only the former can become subject to NSPS. EPA explained over ten years ago that these two types of facilities are not mutually exclusive. In the preamble to the promulgation of revisions to 40 C.F.R. Part 60 on December 15, 1975, (40 Fed. Reg. 58416), which followed less than one month after promulgation of the Section 111(d) plan requirements in Subpart B, EPA stated:

> Understandably there has been some confusion as to the difference between the various types of "sources" and "facilities" defined in §60.2 of these regulations. Generally speaking, "sources" are entire plants, while "facilities" are identifiable pieces of process equipment or individual

components which when taken together would comprise a source. "Affected facilities" are facilities subject to standards of performance and are specifically identified in the first section of each subpart of Part 60. An "existing facility" is generally a piece of equipment or component of the same type as an affected facility, but which differs in that it was constructed prior to the date of proposal of an applicable standard of performance. This distinction is somewhat complicated because an existing facility which undergoes a modification within the meaning of the Act and these regulations becomes an affected facility. However, generally speaking, the distinction between "affected facilities" and "existing facilities" depends on the date of construction. The terms are intended to be direct regulatory counterparts of the statutory definitions of "new source" and "existing source" appearing in section 111 of the Act.

"Designated facilities" form a subcategory of "existing facilities." A "designated facility" is an existing facility which emits a "designated pollutant," i.e., a pollutant which is neither a hazardous pollutant, as defined by section 112 of the Act, nor a pollutant subject to national ambient air quality standards. The term "designated facilities,"

however, has no special relevance to the issue of modification.

Thus, as far as EPA is concerned, NSA's position was rejected long ago.

The language NSA relies upon to make this argument does not compel the conclusion it advocates. For example, NSA contends that because 40 C.F.R. §60.24 allows states the latitude to balance emission guidelines and other factors of public concern in adopting Section 111(d) standards for welfare related pollutants, and because 40 C.F.R. §60.28 allows states to revise their plans to relax those standards, then EPA must have intended that existing sources subject to those standards could increase their emissions to benefit from the relaxed standards without triggering NSPS. NSA's argument appears to assume that a state would never, in its initial Section 111(d) plan, require more emission control that was already in place on existing sources. That assumption is contradicted by the specific provision in 40 C.F.R. §60.24 for compliance schedules in plans to allow existing sources time to comply with Section 111(d) standards. If an existing source could not comply over time with the plan, 40 C.F.R. §60.28 allows the state to relax the standard, presumably to a level the source could achieve. Thus, both 40 C.F.R. §§60.24 and 60.28 can be fully utilized without existing sources increasing their emissions to benefit from use of those powers.

NSA further argues that the language of 40 C.F.R. §60.1 and the lack of use of the term "modification" in Subpart B precludes EPA from applying the definition of modification in 40 C.F.R. §60.14 to NSA. Given that "modification" is defined in the Act and that it includes increases in emissions caused by changes in the operation of control equipment, whether or not the term appears in Subpart B is not determinative, as the statute controls. Regarding 40 C.F.R. §60.1, there is no explanation as to why this

language was added. 40 Fed. Reg. 53346. However, NSA's interpretation of it is unnecessarily broad. The language "Except as provided in Subparts B and C" need not mean if Subpart B applies the other Subparts do not. Rather, it is more reasonable, in light of the Act, that the language means that Subparts B and C apply to the extent they are inconsistent with Subpart A. As discussed above, there is nothing inconsistent under the Act in applying NSPS to existing facilities that undergo modification, regardless of whether the existing facilities are designated facilities. And there is no language in Subpart B that either states or suggests that it is independent and exclusive of Subpart A.

Similarly, the fact that 40 C.F.R. §62.09 does not require the Administrator to determine consistency with Subpart A in promulgating Section 111(d) plan revisions for states is not determinative. The Act defines the contemplated action as a modification that triggers NSPS. Besides, this section does require a determination of consistency with the Act.

IV
CONCLUSION

The plain language of the Act makes the wet scrubbers part of the stationary source. Accordingly, a physical change in or change in the operation of the scrubbers that causes an increase in emissions is a modification that makes the stationary source a new source subject to NSPS. The provisions of 40 C.F.R. Part 60 are not, and cannot be, to the contrary. Therefore, if NSA reduces the operating efficiency of its wet scrubbers and causes an increase in the amount of any air pollutant it emits, the provisions of 40 C.F.R. Part 60, Subpart S, would apply.

Sincerely,

Jack E. Ravan
Regional Administrator

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-3982

NATIONAL-SOUTHWIRE ALUMINUM CO.,
Petitioner-Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY;
LEE A. THOMAS, Administrator, JACK E. RAVEN, Regional Administrator,
Respondents-Appellees.

Before: GUY and BOGGS, Circuit Judges; and WOODS, District Judge.

JUDGMENT

ON PETITION TO REVIEW a decision of the United States Environmental Protection Agency.

THIS CAUSE came on to be heard on the transcript of record from the said agency and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the decision of the said agency in this cause be and the same is hereby affirmed.

IT IS FURTHER ORDERED that the Respondents-Appellees recover from Petitioner the costs on petition, as itemized below.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

Clerk

Issued as Mandate: April 6, 1988
COSTS: None

Filing Fee ..... $
Printing ..... $

Total ..... $

A True Copy.

Attest:

Deputy Clerk

No. 86-3982

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL-SOUTHWIRE ALUMINUM CO.,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER
	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,	)	
	)	
Respondents.	)	

BEFORE: GUY and BOGGS, Circuit Judges and WOODS*, United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

*Hon. George E. Woods sitting by designation from the Eastern District of Michigan

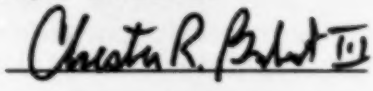
CERTIFICATE OF SERVICE

I hereby certify that I served three true and correct copies of the foregoing Appendix to be mailed first class, postage prepaid, this 19th day of August, 1988 upon:

Solicitor General
Department of Justice
Washington, D.C. 20530

Brian Faller, Attorney
Environmental Defense Section
Land and Natural Resources Division
U.S. Department of Justice
Post Office Box 23986
Washington, D.C. 20026-3986

Earl C. Salo, Esquire
Office of General Counsel
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460



Chester R. Babst III, Esquire
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel of Record for
National-Southwire Aluminum Company

88-315

Supreme Court, U.S.
FILED
JUN 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NATIONAL-SOUTHWIRE ALUMINUM COMPANY,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
LEE A. THOMAS, Administrator, and
JACK E. RAVEN, Regional Administrator,
Respondents.

ON WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

APPENDIX B TO PETITION FOR WRIT OF CERTIORARI

Chester R. Babst III, Esquire
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel of Record for Petitioner
National-Southwire Aluminum Company

No. _____

NATIONAL-SOUTHWIRE ALUMINUM COMPANY,
Petitioner,

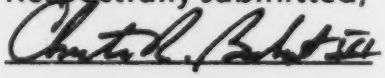
v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
LEE A. THOMAS, Administrator, and
JACK E. RAVEN, Regional Administrator,
Respondents.

APPENDIX B TO PETITION FOR WRIT OF CERTIORARI

Petitioner, National-Southwire Aluminum Company, by its attorneys Babst, Calland, Clements & Zomnir, P.C., files the following Appendix B for the above-captioned Petition for Writ of Certiorari.

Respectfully submitted,



Chester R. Babst III, Esquire
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel of Record for Petitioner
National-Southwire Aluminum Company

TABLE OF CONTENTS

APPENDIX B	Page
Clean Air Act, Section 111	30a
40 C.F.R. §60.5	44a
40 C.F.R. §60.14	44a
40 C.F.R. §60.22	47a
40 C.F.R. §60.24	49a
40 C.F.R. §60.28	51a

Standards of Performance for New Stationary Sources

Sec. 111. (a) For purposes of this section:

(1) The term "standard of performance" means --

(A) with respect to any air pollutant emitted from a category of fossil fuel fired stationary sources to which subsection (b) applies, a standard --

(i) establishing allowable emission limitations for such category of sources, and

(ii) requiring the achievement of a percentage reduction in the emissions from such category of sources from the emissions which would have resulted from the use of fuels which are not subject to treatment prior to combustion,

(B) with respect to any air pollutant emitted from a category of stationary sources (other than fossil fuel fired sources) to which subsection (b) applies, a standard such as that referred to in subparagraph (A)(i); and

(C) with respect to any air pollutant emitted from a particular source to which subsection (d) applies, a standard which the State (or the Administrator under the conditions specified in subsection (d)(2)) determines is applicable to that source and which reflects the degree of emission reduction achievable through the application of the best system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environmental impact and energy

requirements) the Administrator determines has been adequately demonstrated for that category of sources.

For the purpose of subparagraphs (A) (i) and (ii) and (B), a standard of performance shall reflect the degree of emission limitation and the percentage reduction achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. For the purpose of subparagraph[1] (1)(A)(ii), any cleaning of the fuel or reduction in the pollution characteristics of the fuel after extraction and prior to combustion may be credited, as determined under regulations promulgated by the Administrator, to a source which burns such fuel.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term "modification" means any physical change in, or change in the method of

---

[1]So in original public law. Probably should be "paragraph".

operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

(7) The term "technological system of continuous emission reduction" means --

(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels.

(8) A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 or any amendment thereto, or any subsequent enactment which supersedes such Act, or (B) which qualifies under section 113(d)(5)(A)(ii) of this Act, shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.[1]

---

[1]For related provisions, see section 301 of the Powerplant and Industrial Fuel Use act of 1978 (as amended by Public Law 97-35 (sec. 1021)).

(b)(1)(A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within 120 days after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every four years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance or revisions thereof shall become effective upon promulgation.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(5) Except as otherwise authorized under subsection (h), nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A)(i) and (ii) shall be promulgated not later than one year after enactment of this paragraph. Any new of modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed revised standards shall not be required to comply with such revised standards.

(c)(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d)(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 110 under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or 112(b)(1)(A) but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the

Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority --

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 110(c) in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 113 and 114 with respect to an implementation plan. In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

(f)(1) Not later than one year after the date of enactment of this subsection, the Administrator shall promulgate regulations listing under subsection (b)(1)(A) the categories of major stationary sources which are not on the date of the enactment of this subsection included on the list required under subsection (b)(1)(A). The Administrator shall promulgate regulations establishing standards of performance for the percentage of such categories of

sources set forth in the following table before the expiration of the corresponding period set forth in such table:

Period by which standards must be promulgated after date list is required to be promulgated

Percentage of source categories required to be listed for which standards must be established:

25 ..... 2 years
75 ..... 3 years
100 ..... 4 years

(2) In determining priorities for promulgating standards for categories of major stationary sources for the purpose of paragraph (1), the Administrator shall consider --

(A) the quantity of air pollutant emissions which each such category will emit, or will be designed to emit;

(B) the extent to which each such pollutant may reasonably be anticipated to endanger public health or welfare; and

(C) the mobility and competitive nature of each such category of sources and the consequent need for nationally applicable new source standards of performance.

(3) Before promulgating any regulations under this subsection or listing any category of major stationary sources as required under this subsection, the Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies.

(g)(1) Upon application by the Governor of a State showing that the Administrator has failed to

specify in regulations under subsection (f)(1) any category of major stationary sources required to be specified under such regulations, the Administrator shall revise such regulations, to specify any such category.

(2) Upon application by the Governor of a State showing that any category of stationary sources which is not included in the list under subsection (b)(1)(A) contributes significantly to air pollution which may reasonably be anticipated to endanger public health or which may reasonably be anticipated to endanger public health or welfare (notwithstanding that such category is not a category of major stationary sources), the Administrator shall revise such regulations to specify such category of stationary sources.

(3) Upon application of the Governor of a State showing that the Administrator has failed to apply properly the criteria required to be considered under subsection (f)(2), the Administrator shall revise the list under subsection (b)(1)(A) to apply properly such criteria.

(4) Upon application of the Governor of a State showing that --

(A) a new, innovative, or improved technology or process which achieves greater continuous emission reduction has been adequately demonstrated for any category of stationary sources, and

(B) as a result of such technology or process, the new source standard of performance in effect under this section for such category no longer reflects the greatest degree of emission limitation achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such

emission reduction, and any non-air quality health and environmental impact and energy requirements) has been adequately demonstrated,

the Administrator shall revise such standard of performance for such category accordingly.

(5) Upon application by the Governor of a State showing that the Administrator has failed to list any air pollutant which causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness as a hazardous air pollutant under section 112, the Administrator shall revise the list of hazardous air pollutants under such section to include such pollutant.

(6) Upon application by the Governor of a State showing that any category of stationary sources of a hazardous air pollutant listed under section 112 is not subject to emission standards under such section, the Administrator shall propose and promulgate such emission standards applicable to such category of sources.

(7) Unless later deadlines for action of the Administrator are otherwise prescribed under this section or section 112, the Administrator shall, not later than three months following the date of receipt of any application by a Governor of a State, either --

(A) find that such application does not contain the requisite showing and deny such application, or

(B) grant such application and take the action required under this subsection.

(8) Before taking any action required by subsection (f) or by this subsection, the Administrator

shall provide notice and opportunity for public hearing.

(h)(1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which reflects the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. In the event the Administrator promulgates a design or equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) For the purpose of this subsection, the phrase "not feasible to prescribe or enforce a standard of performance" means any situation in which the Administrator determines that (A) a pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

(3) If after notice and opportunity for public hearing, any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source

for purposes of compliance with this section with respect to such pollutant.

(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of standard of performance whenever it becomes feasible to promulgate and enforce such standard in such terms.

(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as a standard of performance for purposes of the provisions of this Act (other than the provisions of subsection (a) and this subsection).

(i) Any regulations promulgated by the Administrator under this section applicable to grain elevators shall not apply to country elevators (as defined by the Administrator) which have a storage capacity of less than two million five hundred thousand bushels.

(j)(1)(A) Any person proposing to own or operate a new source may request the Administrator for one or more waivers from the requirements of this section for such source or any portion thereof with respect to any air pollutant to encourage the use of an innovative technological system or systems of continuous emission reduction. The Administrator may, with the consent of the Governor of the State in which the source is to be located, grant a waiver under this paragraph, if the Administrator determines after notice and opportunity for public hearing, that--

(i) the proposed system or systems have not been adequately demonstrated,

(ii) the proposed system or systems will operate effectively and there is a substantial likelihood that such system or systems will achieve greater continuous emission reduction

than that required to be achieved under the standards of performance which would otherwise apply, or achieve at least an equivalent reduction at lower cost in terms of energy, economic, or nonair quality environmental impact.

(iii) the owner or operator of the proposed source has demonstrated to the satisfaction of the Administrator that the proposed system will not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation, function, or malfunction, and

(iv) the granting of such waiver is consistent with the requirements of subparagraph (C).

In making any determination under clause (ii), the Administrator shall take into account any previous failure to such system or systems to operate effectively or to meet any requirement of the new source performance standards. In determining whether an unreasonable risk exists under clause (iii), the Administrator shall consider, among other factors, whether and to what extent the use of the proposed technological system will cause, increase, reduce, or eliminate emissions of any unregulated pollutants; available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such system; and the availability of other technological systems which may be used to conform to standards under this section without causing or contributing to such unreasonable risk. The Administrator may conduct such tests and may require the owner or operator of the proposed source to conduct such tests and provide such information as is necessary to carry out clause (iii) of this subparagraph. Such requirements shall include a requirement for prompt reporting of the emission of any unregulated

pollutant from a system if such pollutant was not emitted, or was emitted in significantly lesser amounts without use of such system.

(B) A waiver under this paragraph shall be granted on such terms and conditions as the Administrator determines to be necessary to assure--

(i) emissions from the source will not prevent attainment and maintenance of any national ambient air quality standards, and

(ii) proper functioning of the technological system or systems authorized.

Any such term or condition shall be treated as a standard of performance for the purposes of subsection (e) of this section and section 113.

(C) The number of waivers granted under this paragraph with respect to a proposed technological system of continuous emission reduction shall not exceed such number as the Administrator finds necessary to ascertain whether or not such system will achieve the conditions specified in clauses (ii) and (iii) of subparagraph (A).

(D) A waiver under this paragraph shall extend to the sooner of--

(i) the date determined by the Administrator, after consultation with the owner or operator of the source taking into consideration the design, installation and capital cost of the technological system or systems being used, or

(ii) the date on which the Administrator determines that such system has failed to--

(I) achieve at least an equivalent continuous emission reduction to that required to be achieved under the standards of performance which would otherwise apply, or

(II) comply with the condition specified in paragraph (1)(A)(iii),

and that such failure cannot be corrected.

(E) In carrying out subparagraph (D)(i), the Administrator shall not permit any waiver for a source or portion thereof to extend beyond the date--

(i) seven years after the date on which any waiver is granted to such source or portion thereof, or

(ii) four years after the date on which such source or portion thereof commences operation,

whichever is earlier.

(F) No waiver under this subsection shall apply to any portion of a source other than the portion on which the innovative technological system or systems of continuous emission reduction is used.

(2)(A) If a waiver under paragraph (1) is terminated under clause (ii) of paragraph (1)(D), the Administrator shall grant an extension of the requirements of this section for such source for such minimum period as may be necessary to comply with the applicable standard of performance under this section. Such period shall not extend beyond the date three years from the time such waiver is terminated.

(B) An extension granted under this paragraph shall set forth emission limits and a

compliance schedule containing increments of progress which require compliance with the applicable standards of performance as expeditiously as practicable and include such measures as are necessary and practicable in the interim to minimize emissions. Such schedule shall be treated as a standard of performance for purposes of subsection (e) of this section and section 113.

40 C.F.R. § 60.5 Determination of construction or modification.

(a) When requested to do so by an owner or operator, the Administrator will make a determination of whether action taken or intended to be taken by such owner or operator constitutes construction (including reconstruction) or modification or the commencement thereof within the meaning of this part.

(b) the Administrator will respond to any request for a determination under paragraph (a) of this section within 30 days of receipt of such request.

[40 FR 58418, Dec. 16, 1975]

40 C.F.R. § 60.14 Modification.

(a) Except as provided under paragraphs (e) and (f) of this section, any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111 of the Act. Upon modification, an existing facility shall become an affected facility for each pollutant to which a standard applies and for which there is an increase in the emission rate to the atmosphere.

(b) Emission rate shall be expressed as kg/hr of any pollutant discharged into the atmosphere for

which a standard is applicable. The Administrator shall use the following to determine emission rate:

(1) Emission factors as specified in the latest issue of "Compilation of Air Pollutant Emission Factors," EPA Publication No. AP-42, or other emission factors determined by the Administrator to be superior to AP-42 emission factors, in cases where utilization of emission factors demonstrate that the emission level resulting from the physical or operational change will either clearly increase or clearly not increase.

(2) Material balances, continuous monitor data, or manual emission tests in cases where utilization of emission factors as referenced in paragraph (b)(1) of this section does not demonstrate to the Administrator's satisfaction whether the emission level resulting from the physical or operational change will either clearly increase or clearly not increase, or where an owner or operator demonstrates to the Administrator's satisfaction that there are reasonable grounds to dispute the result obtained by the Administrator utilizing emission factors as referenced in paragraph (b)(1) of this section. When the emission rate is based on results from manual emission tests or continuous monitoring systems, the procedures specified in Appendix C of this part shall be used to determine whether an increase in emission rate has occurred. Tests shall be conducted under such conditions as the Administrator shall specify to the owner or operators based on representative performance of the facility. At least three valid test runs must be conducted before and at least three after the physical or operational change. All operating parameters which may affect emissions must be held constant to the maximum feasible degree for all test runs.

(c) The addition of an affected facility to a stationary source as an expansion to that source or as a replacement for an existing facility shall not by itself

bring within the applicability of this part any other facility within that source.

(d) [Reserved]

(e) The following shall not, by themselves, be considered modifications under this part:

(1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category, subject to the provisions of paragraph (c) of this section and § 60.15.

(2) An increase in production rate of an existing facility, if that increase can be accomplished without a capital expenditure on that facility.

(3) An increase in the hours of operation.

(4) Use of an alternative fuel or raw material if, prior to the date any standard under this part becomes applicable to that source type, as provided by § 60.1, the existing facility was designed to accommodate that alternative use. A facility shall be considered to be designed to accommodate an alternative fuel or raw material if that use could be accomplished under the facility's construction specifications as amended prior to the change. Conversion to coal required for energy considerations, as specified in section 111(a)(8) of the Act, shall not be considered a modification.

(5) The addition or use of any system or device whose primary function is the reduction of air pollutants, except when an emission control system is removed or is replaced by a system which the Administrator determines to be less environmentally beneficial.

(6) The relocation or change in ownership of an existing facility.

(f) Special provisions set forth under an applicable subpart of this part shall supersede any conflicting provisions of this section.

(g) Within 180 days of the completion of any physical or operational change subject to the control measures specified in paragraph (a) of this section, compliance with all applicable standards must be achieved.

[40 FR 58419, Dec. 16, 1975, amended at 43 FR 34347, Aug. 3, 1978; 45 FR 5617, Jan. 23, 1980]

40 C.F.R. § 60.22 Publication of guideline documents, emission guidelines, and final compliance times.

(a) After promulgation of a standard of performance for the control of a designated pollutant from affected facilities, the Administrator will publish a draft guideline document containing information pertinent to control of the designated pollutant from designated facilities. Notice of the availability of the draft guideline document will be published in the FEDERAL REGISTER, and public comments on its contents will be invited. After consideration of public comments, a final guideline document will be published and notice of its availability will be published in the FEDERAL REGISTER.

(b) Guideline documents published under this section will provide information for the development of State plans, such as:

(1) Information concerning known or suspected endangerment of public health or welfare caused, or contributed to, by the designated pollutant.

(2) A description of systems of emission reduction which, in the judgment of the Administrator, have been adequately demonstrated.

(3) Information on the degree of emission reduction which is achievable with each system, together with information on the costs and environmental effects of applying each system to designated facilities.

(4) Incremental periods of time normally expected to be necessary for the design, installation, and startup of identified control systems.

(5) An emission guideline that reflects the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated for designated facilities, and the time within which compliance with emission standards of equivalent stringency can be achieved. The Administrator will specify different emission guidelines or compliance times or both for different sizes, types, and classes of designated facilities when costs of control, physical limitations, geographical location, or similar factors make subcategorization appropriate.

(6) Such other available information as the Administrator determines may contribute to the formulation of State plans.

(c) Except as provided in paragraph (d)(1) of this section, the emission guidelines and compliance times referred to in paragraph (b)(5) of this section will be proposed for comment upon publication of the draft guideline document, and after consideration of comments will be promulgated in Subpart C of this part with such modifications as may be appropriate.

(d)(1) If the Administrator determines that a designated pollutant may cause or contribute to endangerment of public welfare, but that adverse effects on public health have not been demonstrated, he will include the determination in the draft guideline document and in the FEDERAL REGISTER

notice of its availability. Except as provided in paragraph (d)(2) of this section, paragraph (c) of this section shall be inapplicable in such cases.

(2) If the Administrator determines at any time on the basis of new information that a prior determination under paragraph (d)(1) of this section is incorrect or no longer correct, he will publish notice of the determination in the FEDERAL REGISTER, revise the guideline document as necessary under paragraph (a) of this section, and propose and promulgate emission guidelines and compliance times under paragraph (c) of this section.

40 C.F.R. § 60.24 Emission standards and compliance schedules.

(a) Each plan shall include emission standards and compliance schedules.

(b)(1) Emission standards shall prescribe allowable rates of emissions except when it is clearly impracticable. Such cases will be identified in the guideline documents issued under § 60.22. Where emission standards prescribing equipment specifications are established, the plan shall, to the degree possible, set forth the emission reductions achievable by implementation of such specifications, and may permit compliance by the use of equipment determined by the State to be equivalent to that prescribed.

(2) Test methods and procedures for determining compliance with the emission standards shall be specified in the plan. Methods other than those specified in Appendix A to this part may be specified in the plan if shown to be equivalent or alternative methods as defined in § 60.2 (t) and (u).

(3) Emission standards shall apply to all designated facilities within the State. A plan may contain emission standards adopted by local

jurisdictions provided that the standards are enforceable by the State.

(c) Except as provided in paragraph (f) of this section, where the Administrator has determined that a designated pollutant may cause or contribute to endangerment of public health, emission standards shall be no less stringent than the corresponding emission guideline(s) specified in Subpart C of this part, and final compliance shall be required as expeditiously as practicable but no later than the compliance times specified in Subpart C of this part.

(d) Where the Administrator has determined that a designated pollutant may cause or contribute to endangerment of public welfare but that adverse effects on public health have not been demonstrated, States may balance the emission guidelines, compliance times, and other information provided in the applicable guideline document against other factors of public concern in establishing emission standards, compliance schedules, and variances. Appropriate consideration shall be given to the factors specified in § 60.22(b) and to information presented at the public hearing(s) conducted under § 60.23(c).

(e)(1)Any compliance schedule extending more than 12 months from the date required for submittal of the plan shall include legally enforceable increments of progress to achieve compliance for each designated facility or category of facilities. Increments of progress shall include, where practicable, each increment of progress specified in § 60.21(h) and shall include such additional increments of progress as may be necessary to permit close and effective supervision of progress toward final compliance.

(2) A plan may provide that compliance schedules for individual sources or categories of sources will be formulated after plan submittal. Any

such schedules shall be the subject of a public hearing held according to § 60.23 and shall be submitted to the Administrator within 60 days after the date of adoption of the schedule but in no case later than the date prescribed for submittal of the first semiannual report required by § 60.25(e).

(f) On a case-by-case basis for particular designated facilities, or classes of facilities, States may provide for the application of less stringent emission standards or longer compliance schedules than those otherwise required by paragraph (c) of this section, provided that the State demonstrates with respect to each such facility (or class of facilities):

(1) Unreasonable cost of control resulting from plant age, location, or basic process design;

(2) Physical impossibility of installing necessary control equipment; or

(3) Other factors specific to the facility (or class of facilities) that make application of a less stringent standard or final compliance time significantly more reasonable.

(g) Nothing in this subpart shall be construed to preclude any State or political subdivision thereof from adopting or enforcing (1) emission standards more stringent than emission guidelines specified in Subpart C of this part or in applicable guideline documents or (2) compliance schedules requiring final compliance at earlier times than those specified in Subpart C or in applicable guideline documents.

40 C.F.R. § 60.28 Plan revisions by the State.

(a) Plan revisions which have the effect of delaying compliance with applicable emission standards or increments of progress or of establishing less stringent emission standards shall be submitted to the Administrator within 60 days after adoption in

accordance with the procedures and requirements applicable to development and submission of the original plan.

(b) More stringent emission standards, or orders which have the effect of accelerating compliance, may be submitted to the Administrator as plan revisions in accordance with the procedures and requirements applicable to development and submission of the original plan.

(c) A revision of a plant, or any portion thereof, shall not be considered part of an applicable plant until approved by the Administrator in accordance with this subpart.

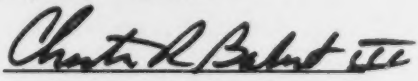
CERTIFICATE OF SERVICE

I hereby certify that I served three true and correct copies of the foregoing Appendix to be mailed first class, postage prepaid, this 19th day of August, 1988 upon:

Solicitor General
Department of Justice
Washington, D.C. 20530

Brian Faller, Attorney
Environmental Defense Section
Land and Natural Resources Division
U.S. Department of Justice
Post Office Box 23986
Washington, D.C. 20026-3986

Earl C. Salo, Esquire
Office of General Counsel
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460



Chester R. Babst III, Esquire
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel of Record for
National-Southwire Aluminum Company

(3)

Supreme Court, U.S.
FILED
JUN 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

88-315

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NATIONAL-SOUTHWIRE ALUMINUM COMPANY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
LEE A. THOMAS, Administrator, and
JACK E. RAVEN, Regional Administrator,

Respondents.

ON WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

APPENDIX C TO PETITION FOR WRIT OF CERTIORARI

Chester R. Babst III, Esquire
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel of Record for Petitioner
National-Southwire Aluminum Company

No. _____

NATIONAL-SOUTHWIRE ALUMINUM COMPANY,

Petitioner,

v.

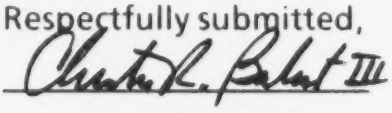
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
LEE A. THOMAS, Administrator, and
JACK E. RAVEN, Regional Administrator,

Respondents.

APPENDIX A TO PETITION FOR WRIT OF CERTIORARI

Petitioner, National-Southwire Aluminum Company, by its attorneys Babst, Calland, Clements & Zomnir, P.C., files the following Appendix C for the above-captioned Petition for Writ of Certiorari.

Respectfully submitted,



Chester R. Babst III, Esquire
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel of Record for Petitioner
National-Southwire Aluminum Company

TABLE OF CONTENTS

APPENDIX C Page

EPA Region IV, "Technical Support Document for the Revision to Kentucky's §111(d) Plan for Controlling Fluoride Emissions from Existing Primary Aluminum Reduction Plants" (June 24, 1986) 53a

Technical Support Document for the
Revision to Kentucky's §111(d) Plan for
Controlling Fluoride Emissions from
Existing Primary Aluminum Reduction Plants

Introduction

On April 3, 1986, the State of Kentucky submitted to EPA a revision to their 111(d) plan for controlling fluoride emissions from existing primary aluminum reduction plants. This revision included a change in the regulations which apply to National Southwire Aluminum Company (NSA) in Hawesville, Kentucky. NSA is the only aluminum plant in the State which uses a wet scrubbing system to remove gaseous fluoride emissions, and is thus the only facility affected by this 111(d) plant revision.

The original Kentucky plan for controlling fluoride from existing primary aluminum reduction plants was approved by EPA on May 26, 1982 (47 FR 22955). The plan regulated the two existing aluminum plants in the State (one of which was NSA) and included Kentucky's air pollution control regulation 401 KAR 61:165 (Existing Primary Aluminum Reduction Plants). This rule contained, among other requirements, emission standards for particulates and gaseous fluorides. Since NSA utilized a wet scrubbing system, it was limited to 1.0 pounds of gaseous fluoride emissions per ton of aluminum produced (1lb/ton Al) through the primary control system, and to 3.25 pounds of gaseous fluorides per hour (1lb/hr) through any potroom roof monitor. NSA was also subject to a particulate standard of 0.01 grains per standard cubic foot (gr/scf). The other primary aluminum plant utilized a dry scrubbing system; it was subject to a total fluoride emission limit of 1.9 lb/ton Al (with certain exceptions made for emissions up to 2.5 lb/ton Al when the control system was properly operating). The New Source Performance Standard (NSPS) for this type of aluminum reduction plant is 1.9 pounds of total fluoride per ton of aluminum produced.

The NSA plant was originally constructed in the late 1960's. Since dry scrubbing technology was not commercially available at that time, the company installed wet scrubbers to control both particulate emissions and gaseous fluorides. After several years of operation, it became evident that the wet scrubbing system was not an effective means of controlling particulates. Thus, in 1979, NSA installed eight dry electrostatic precipitators (ESPs) to more efficiently capture the particulate matter in the primary control gas stream. The wet scrubbers were used after the ESPs to further control gaseous fluoride emissions. Several years later, during a maintenance-related shutdown of the wet scrubbing system, NSA's ambient monitors detected no drastic change in ambient fluoride levels as a result of not scrubbing the exhaust gases. In 1983, the company asked the State for an exemption from 401 KAR 61:165 so they could permanently shut down their scrubbers. Since the State believed this shutdown would not cause a violation of the State's ambient fluoride standard, they granted the exemption and pursued a revision to their federally-approved 111(d) plan.

The revision, as submitted to EPA on April 3, 1986, contains several changes to 401 KAR 61:165. First, the State has increased the allowable gaseous fluoride emission limit for NSA's primary control system from 1.0 lb/ton Al to 290 lb/hr (13.18 lb/ton Al). The limit on particulate emissions will remain unchanged. Secondly, they have added a minimum stack height requirement for the primary control system. This height of 400 feet is the height of the current primary control system stack at NSA. It was included in the regulation solely to ensure that NSA will not use a lower stack. Use of a lower stack could cause an increase in ambient fluoride levels because less dispersion would occur. The stack is not subject to EPA's recent stack height regulation revisions because it was built prior to January 1, 1971, and is considered to be "grandfathered". Third, the State has deleted

the definition of "wet scrubbing plant" because it is no longer needed. Every instance where the words "wet scrubbing plant" appeared in 401 KAR 61:165, the State has replaced them with the words "primary aluminum reduction plant other than a dry scrubbing plant". Fourth, the State has added a provision which states that a physical change in the plant (or in the method of operation of the plant) which occurs in order to comply with the new emission limit is not considered to be a "modification". All of the above revisions to 401 KAR 61:165 are acceptable except for the exemption of NSA from "modification" status. These rule changes and the criteria for their approval/disapproval will be discussed in subsequent sections.

Approval Criteria for New Emission Limit

Under §111(d) of the Clean Air Act and Subpart B of 40 CFR Part 60, states are required to develop plans for controlling designated pollutants from designated facilities. Designated pollutants are pollutants which are not criteria or hazardous pollutants (as listed under §108 or §112 of the Act), but for which standards of performance for new sources have been established under §111(b). A designated facility is an existing facility which emits a designated pollutant and which would be subject to a New Source Performance Standard for that pollutant if the facility were new.

EPA has drawn a distinction between designated pollutants which may endanger public health and those for which adverse effects on public health have not been demonstrated. The Administrator has determined that fluoride emissions from primary aluminum plants may cause adverse effects on public welfare but that they do not pose a threat to public health. For health-related pollutants, state emission standards must ordinarily be at least as stringent as the corresponding EPA guideline emission limits. However, for welfare-related pollutants, states may

apply less stringent requirements when those requirements are justified by economic factors or physical limitations.

Under current EPA requirements, states have been given substantial flexibility in establishing plans for the control of welfare-related pollutants such as fluorides. This policy is stated in 40 CFR 60.24(d) as follows:

> Where the Administrator has determined that a designated pollutant may cause or contribute to the endangerment of public welfare but that adverse effects on public health have not been demonstrated, states may balance the emission guidelines, compliance times, and other information provided in the applicable guideline document against other factors of public concern in establishing emission standards, compliance schedules and variances.

Although this flexible policy applies to the original development of 111(d) plans, similar criteria may be considered when reviewing revisions to existing state regulations for welfare-related pollutants.

Kentucky has justified their request for a more lenient gaseous fluoride emission limit through cost figures, process descriptions and an environmental impact assessment. EPA has reviewed this documentation against the factors contained in the guideline document and has found that the State's request is adequately justified by economic, technical and other related criteria.

Recommended Control Technology

EPA's guideline document (EPA 450/2-78-049b, December 1979) sets out the recommended technology for controlling particulate and gaseous

fluorides from existing primary aluminum reduction plants. The prescribed fluoride emission controls are not expressed in terms of emission limitations, but as equipment specifications for achieving a certain level of control. EPA's guideline document emphasizes that the installation of fluoride controls in existing plants varies greatly in capital expenditures and operating costs. Therefore, actual control requirements must be specific to the plant and tailor-made for it. The guidelines further state that control officials should carefully study costs, ambient impacts and energy requirements before requiring improved control on any particular facility.

The primary aluminum reduction process results in two types of emissions: those which are captured by the hood system and are vented through the primary control device (primary emissions) and those which elude the hood system and exit the building through the roof monitors (secondary emissions). EPA has determined that the best control for existing aluminum plants is an effective hooding system (to minimize secondary emissions) in combination with primary removal equipment. Most plants do not (and are not required to) control secondary emissions. NSA does not have secondary emission controls, but is subject to a gaseous fluoride emission standard for their eight roof monitors, as well as to a total limit on visible emissions from the plant. Total fluoride emissions from the aluminum process consist of both particulate fluorides and gaseous fluorides. Therefore, the primary control equipment should be designed to remove both constituents. The most typically used primary control equipment is a wet or a dry scrubbing system. ESPs can also be used, but are less effective in controlling the gaseous portion of total fluoride emissions.

National Southwire Aluminum - Present Control Options

The current control technology being used at NSA consists of hooding, multicyclones, dry ESPs and wet scrubbers (in that order). This combination has shown to be an overly effective means of controlling total fluoride emissions, but has also resulted in exhorbitant control costs. In an effort to cut production expenses, NSA has asked the State to allow them to shut down the wet scrubbing system. This would leave the primary control system as consisting of collection hoods, multicyclones and dry ESPs. This control combination has also shown to be an effective means of controlling fluoride emissions (at a reasonable cost). A third option available to the company would be to install a dry scrubbing system. The use of wet scrubbers as a sole means of controlling fluorides has already been shown to be ineffective and is therefore not a viable control option.

Justification for New Emission Limit

National Southwire has requested a relaxation in the gaseous fluoride emission standard as it applies to their facility. By allowing 290 lb/hr to be discharged from the primary control system, the State will be allowing NSA to remove their wet scrubbing system and still comply with the requirements of 401 KAR 61:165. The State has submitted an economic justification for the approval of this new limit, as well as the data to show that the new limit will not cause any ambient problems.

A. Cost Analysis

In the table below, capital and annualized costs are given for the various control options available to NSA. The costs for the various control scenarios were derived by NSA and submitted to EPA with the State's 111(d) plan revision. EPA's typical control costs were taken from the guideline document (p. 8-4). All cost figures have been adjusted to 1985 dollars using the Engineering News Record Construction Cost Index

(ENR, Vol. 216, No. 12, March 20, 1986, p. 107), and are based on a production rate of 212,000 tons of aluminum per year (TPY Al). See Appendix I for detailed cost calculations.

Control Cost Comparisons

Control Option	Capital (1985/annual ton Al)	Annualized Costs (1985$/ton Al)
NSA-ESPs + Wet Scrubbers	247.74	24.73
NSA - ESPs	180.42	14.25
NSA - Dry Scrubbers	142.74	8.09
EPA - Guideline Controls	119.24	5.00

All of the above control scenarios have costs which exceed EPA's typical (or expected) control costs. NSA is currently operating both the ESPs and the wet scrubbers. Although the initial capital cost associated with that equipment has already been expended, the operation of the control equipment costs NSA $24.73 per annual ton of aluminum produced. This is nearly five times EPA's typical annualized control costs. NSA has requested (through this 111(d) plan revision) that they be allowed to operate the ESPs without the wet scrubbers. The annualized cost of operating the ESPs has been estimated at $14.25 per ton of aluminum produced. This value also exceeds EPA's typical costs,

but the operation of just the ESPs would provide a significant cost savings for the company. Although the capital and annualized costs for the installation and operation of dry scrubbers are less than for the previous two options, the company would have to totally rework their primary control system. They would also be forced to spend the initial capital to purchase new controls when they already have sufficient controls installed. NSA has also claimed that for certain process-related reasons, dry scrubbing is not a realistic control alternative. Because dry scrubbing allows the reuse of fluorides in the production process, other materials such as iron and silicon are also introduced. This compromises the purity of the aluminum produced by NSA and is unacceptable when considering the demands of the aluminum market.

Thus, from an economic standpoint, NSA has already spent and will continue to spend over and above what is expected for controlling total fluoride emissions from their plant. The relaxation of NSA's gaseous fluoride emission limit is consistent with EPA's handling of 111(d) plant relaxations. Since NSA's future control costs (for the ESPs only) would not drop below EPA's guideline costs, the new emission limit of 290 lb/hr appears to be approvable.

B. Ambient Analysis

NSA has also justified the relaxation of their primary control emission standard by assessing the air quality impact of the increase in gaseous fluoride emission levels. By removing the wet scrubbers (and changing allowable emissions from 1.0 lb/ton Al (22 lb/hr) to 290 lb/hr (13.18 lb/ton Al)) the company has estimated that an additional 1174 TPY of gaseous fluorides will be vented to the atmosphere. NSA has shown through ambient monitoring data and modeling analyses that this increase in emissions will not have a harmful effect on the environment.

Although EPA has not adopted a federal ambient air quality standard for fluorides, the State of Kentucky has. This standard is based on the ambient concentrations which could cause adverse effects on vegetation. It specifies maximum 1-month, 1-week, 24-hour and 12-hour average concentrations. The maximum 12-hour average standard is 4.5 parts per billion (ppb).

During the period of March 1983 to March 1984, NSA was granted an exemption by the State to operate without their wet scrubbing fluoride removal system. During that period, the company collected ambient fluoride data at eight sites around their facility. This data showed no detectable increase in ambient fluoride concentrations over similar monitoring data collected while the scrubbers were in operation (1980-1982). Furthermore, the measured concentrations never exceeded ambient standards except for a few scattered violations over the four years which occurred on plant property, 800 meters from the stack. These violations occurred under both control scenarios (scrubbers off and scrubbers on) and are irrelevant as far as EPA is concerned, because there is no federal ambient standard for fluorides.

The company has also performed a vegetative analysis to document that the increase in fluoride emissions from their plant will not cause a detrimental effect on the foliage in the area.

NSA also presented modeling results to show that the new emission limit will not endanger the environment. An Industrial Source Complex Short-Term Model was used, assuming a fluoride emission rate of 350 lb/hr (approximately 20% greater than the 290 lb/hr allowable limit). Modeling results predicted the highest impact to be 2.598 ug/m^3 (12-hour average) at a distance of 11 kilometers from the source. That value is only 71% of the State's ambient air quality standard. Because §111(d) of the Clean Air Act does not establish any ambient standards, the

modeling performed by NSA is legally irrelevant. However, it does provide an indication of the insignificant environmental effects of this 111(d) plan revision.

Disapproval of "Modification" Provision

As part of this 111(d) plan revision, the State of Kentucky has revised the "Applicability" portion of 401 KAR 61:165 to state that a change in potroom operations (eg. scrubber shutdown) at NSA would not be considered a "modification" for the purposes of New Source Performance Standards. If the shutdown of the scrubbers was classified as a "modification", then the source would become subject to the New Source Performance Standard (NSPS) for primary aluminum reduction plants (40 CFR Part 60, Subpart S) and be required to meet more stringent federal control requirements than are allowed under §111(d) (40 CFR Part 60, Subpart B). (See Appendix II for a more detailed description of this argument.)

It has been argued, based upon various provisions in 40 CFR Part 60, that since 40 CFR 60.28 provides for the relaxation of emission standards in 111(d) plants, EPA must have intended that existing facilities could increase their emissions up to the relaxed standards without triggering the applicability of New Source Performance Standards. Such an argument is clearly contrary to the controlling statutory provisions of §111. Under that Section, any physical change in, or change in the operation of, a facility that increases emissions is a modification that triggers NSPS applicability. Further, nothing in §111(d) authorizes EPA to approve a state's rules that could exempt an existing facility from the other provisions of Section 111. For this reason Kentucky's provision for exempting NSA's "change in operation" from "modification" status is unapprovable.

The disapproval of this paragraph does not mean that a state cannot relax its 111(d) standards through a

plant revision, nor does it mean that existing sources cannot benefit from such a relaxation. Existing sources that were never able to meet a §111(d) standard would obviously benefit from a relaxation of that standard. Thus, if National Southwire had been emitting 290 lb/hr of fluoride before the date the NSPS for primary aluminum reduction plants was proposed, the relaxation EPA is approving would bring the facility into compliance with the §111(d) plan, and NSPS would not be triggered because there would be no increase in emissions.

Conclusion

Except for the revisions to Section 1 of 401 KAR 61:165 (Applicability), the plan revision for National Southwire Aluminum is approvable under the provisions of §111(d) of the Clean Air Act and 40 CFR Part 60, Subpart B. Although NSA is justifiably allowed to remove their wet scrubbers under §111(d), they may do so only at the risk of becoming subject to more stringent emission standards. For, under 40 CFR 60.14(e), NSA would be undergoing a "modification" and would be subject to the NSPS for primary aluminum plants found in 40 CFR Part 60, Subpart S.

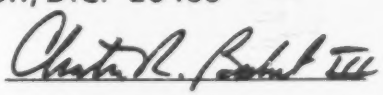
CERTIFICATE OF SERVICE

I hereby certify that I served three true and correct copies of the foregoing Appendix to be mailed first class, postage prepaid, this 19th day of August, 1988 upon:

Solicitor General
Department of Justice
Washington, D.C. 20530

Brian Faller, Attorney
Environmental Defense Section
Land and Natural Resources Division
U.S. Department of Justice
Post Office Box 23986
Washington, D.C. 20026-3986

Earl C. Salo, Esquire
Office of General Counsel
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460



Chester R. Babst III, Esquire
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel of Record for
National-Southwire Aluminum Company